

OVERSIGHT HEARING ON THE ELECTION ASSISTANCE COMMISSION

HEARING BEFORE THE SUBCOMMITTEE ON ELECTIONS COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS FIRST SESSION

MEETING HELD IN WASHINGTON, DC, AUGUST 2, 2007

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OVERSIGHT HEARING ON THE ELECTION ASSISTANCE COMMISSION

THURSDAY, AUGUST 2, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 2:12 p.m., in room 1310, Longworth House Office Building, Hon. Zoe Lofgren presiding.

Present: Representatives Lofgren, Gonzalez, Davis of Alabama, Ehlers, and McCarthy.

Staff Present: Liz Birnbaum, Staff Director; Thomas Hicks, Senior Election Counsel; Janelle Hu, Election Counsel; Jennifer Daehn, Election Counsel; Matt Pinkus, Professional Staff/Parliamentarian; Kristin McCowan, Chief Legislative Clerk; Daniel Favarulo, Staff Assistant, Elections; Kyle Anderson, Press Director; Gineen Beach, Minority Election Counsel; Fred Hay, Minority General Counsel; and Bryan T. Dorsey, Minority Professional Staff.

Ms. LOFGREN. The Subcommittee on Elections will come to order. Today's Elections Subcommittee hearing will focus on the standards, management, and procedures of the U.S. Election Assistance Commission. The EAC is an independent, bipartisan commission created by the Help America Vote Act of 2002, otherwise known as HAVA. The EAC is charged with administering payments to States and developing guidance to meet HAVA requirements, implementing election administration improvements, adopting voluntary voting system guidelines, accrediting voting system test laboratories and certifying voting equipment, and serving as a national clearinghouse and resource of information regarding election administration.

The EAC was originally established to serve as an independent, bipartisan agency. However, the EAC is increasingly being criticized for a lack of transparency and partisan decisionmaking. As Chair of the Elections Subcommittee, I too have made my concerns known about the apparent politicization of this agency, which is why we are having this hearing today.

Through HAVA, the EAC is required to provide thorough, publicly available research on various election administration policy initiatives. In particular, HAVA required a study on voter fraud and intimidation and a study on the impact of voter identification on voter turnout. In fulfilling this duty, the EAC delayed the release of the reports and altered the findings of the report on voter fraud.

While both the Democratic and the Republican election experts contracted to conduct the research found, quote, "widespread but

not unanimous agreement that there is little polling fraud,” unquote, the EAC issued a voter fraud and intimidation report with alternative findings that claimed the pervasiveness of fraud is still open to debate.

Adding to concern about management at the EAC was its refusal for months to release the voter identification report, which found that voter identification laws can suppress turnout in minority communities.

Despite its concern with the research methodology, EAC eventually released the study in response to intense pressure from the media, the public, and Congress. The EAC’s recent handling of the voter fraud and intimidation and voter identification studies have cast a shadow of partisan influence over the agency. I do commend the commissioners for formally requesting the Office of the Inspector General to review the contracting procedures and circumstances surrounding the Commission’s discussion and deliberation of the two EAC projects.

However, I am disturbed that it took considerable public outcry to prompt this request, and eagerly await the IG report. It is my hope that in this hearing we will learn more about how the EAC makes decisions, the role of senior staff of the agency in the process. I am concerned that the advice coming out of the commission is inconsistent, and is made in a unilateral manner, without the input or official action of the four commissioners.

In addition to this, I would like to explore the role of the Department of Justice as a member of the EAC Advisory Board. As a result of my request for all correspondence and documents related to the two studies of concern, it became apparent that the Department of Justice played a significant role in the drafting and redrafting of at least the report on voter fraud and intimidation. Those 12 boxes of documents, which the EAC later publicly released, provide much insight into the operations of this agency. The EAC has limited authority, in light of its role as a nonpartisan research clearinghouse with minimal rulemaking authority. It also has a very limited ability to issue advisory opinions on Federal election law. These documents lead me to question if any of the EAC’s actions have gone beyond the EAC’s statutory mandate.

Finally, I wish to explore why Congress has become the last person on the EAC call list when it takes action. The EAC has failed to inform Congress of important developments relating to the EAC’s statutory responsibilities, such as accrediting our Nation’s voting machines. Congress should not learn of the EAC action by reading the New York Times.

The purpose of congressional oversight of the EAC is to ensure that our voting system is public and transparent. While administrative requirements are time-consuming, they serve a greater purpose.

Unfortunately, I wish I could say that the EAC is the only one to blame for the lack of communication with Congress. The Committee on House Administration, under the now minority, held only three hearings on the EAC since 2005, and only one of those was specifically an oversight hearing. We cannot continue to allow an agency tasked with overseeing elections to continue on without oversight.

My hope is that this hearing will be the first step in working to see that the EAC improves their process and management. In 2008, we will be facing a Presidential election, and much of the focus of our Nation and Congress will be on the EAC. The EAC cannot continue down a path that results in reports and recommendations that restrict the right to vote of eligible Americans. I am encouraged that over the past few months the EAC has become more proactive in reporting its activities to Congress. I am pleased that the commissioners are publicly acknowledging the problems the agency has faced. However, these positive steps are not the end of the road. There is much work to be done.

I thank the EAC for cooperating with this committee, and would like to stress not only my concern for the need for significant changes in the agency, but the concern of this body, and more importantly, the American voters.

I would now like to invite our Ranking Member, Congressman Kevin McCarthy, for any opening statement he may have.

[The statement of Ms. Lofgren follows:]

**Committee on House Administration
Subcommittee on Elections**

**Chairwoman Lofgren
Opening Statement**

Oversight Hearing on the Election Assistance Commission

Thursday, August 2, 2007

Today's Elections Subcommittee hearing will focus on the standards, management, and procedures of the U.S. Election Assistance Commission (EAC). The EAC is an independent bipartisan commission created by the Help America Vote Act of 2002 (HAVA). The EAC was originally established to serve as an independent bipartisan agency. However, the EAC is increasingly being criticized for a lack of transparency and partisan decision making.

Through HAVA, the EAC is required to provide thorough, publicly available research on various election administration policy initiatives. In particular, HAVA required a study on voter fraud and intimidation and a study on the impact of voter identification on voter turnout. Contrary to its duty, the EAC delayed the release of the reports and altered the findings of the report on voter fraud. Although the election experts contracted to conduct the research found "widespread but not unanimous agreement that there is little polling place fraud," the EAC issued a Voter Fraud & Intimidation report with alternative findings that claimed the pervasiveness of fraud is still open to debate.

Adding to concern about management at the EAC was its refusal for months to release the Voter Identification report, which found that voter identification laws can suppress turnout in minority communities. The EAC eventually released the study in response to intense pressure from the media, the public, and Congress. The EAC's recent handling of the Voter Fraud & Intimidation and Voter Identification studies have cast a shadow of partisan influence over the agency. I applaud the Commissioners for formally requesting the Office of Inspector General to review the contracting procedures and circumstances surrounding the Commission's discussion and deliberation of the two EAC projects. However, I am disturbed that it took considerable public outcry to prompt this request and eagerly await the IG report.

It is my hope that in this hearing we will learn more about how the EAC makes decisions and the role of senior staff of the agency in the process. I am concerned that the advice coming out of the Commission is inconsistent and is made in a unilateral matter without the input or official action of the four commissioners. In addition to this, I would like to explore the role of the Department of Justice as a member of the EAC advisory board. As a result of my request for all correspondence and documents related to the two studies of concern, it became apparent that the Department of Justice played a significant role in the drafting and redrafting of at least the report on Voter Fraud and Intimidation. Those

12 boxes of documents, which the EAC later publicly released, provide much insight into the operations of this agency. The EAC has limited authority, in light of its role as a non-partisan research clearinghouse with minimal rulemaking authority. It also has a very limited ability to issue advisory opinions on federal election law. These documents lead me to question if any of the EAC's actions have gone beyond its statutory mandate?

Finally, I wish to explore why Congress has become the last person on the EAC call list when it takes action. The EAC has failed to inform Congress of important developments relating to the EAC's statutory responsibilities, such as accrediting our nation's voting machines. The purpose of Congressional oversight of the EAC is to ensure that our voting system is public and transparent. While administrative requirements are time consuming, they serve a greater purpose. Unfortunately, I wish I could say that the EAC is the only one to blame for the lack of communication with Congress. The Committee on House Administration under the now minority held only three hearings on the EAC since 2005 and only one of those was specifically an oversight hearing.

We cannot continue to allow an agency tasked with overseeing elections continue on without oversight. My hope is that this hearing will be the first step in working the EAC to improve their process and management. In 2008 we will be facing a presidential election and the much of the focus of our nation and Congress will be on the EAC. The EAC cannot continue down a path that results in reports and recommendations that restrict the right to vote of eligible Americans. I am encouraged that over the past few months the EAC has become more proactive in reporting its activities to Congress. I am pleased that Commissioners are publicly acknowledging the problems the agency has faced. However, these positive steps are not the end of the road. There is much work to be done. I thank the EAC for cooperating with this Committee and would like to stress not only my concern for the need for significant changes in the agency, but the concern of this body and more importantly, the American voters.

Mr. MCCARTHY. I appreciate the Chair for allowing me to make an opening statement. I am actually grateful that we are having an oversight hearing. And one thing I would like to explain during this oversight is for our ability to gather information, EAC has a board, has a commission. I would hate for this body to ever try to push their will from a political basis of where that commission, what they should write, what they should do.

That is why I like the oversight hearings, so we gather information, we have a greater understanding of what is going on, not one that we push a political agenda.

Madam Chair, I have some materials that are germane to this hearing, and I ask for unanimous consent it be entered into the record.

Ms. LOFGREN. We always permit such unanimous consent requests, although I am curious what it is. Without objection, it is entered.

[The information follows:]



SECRETARY OF STATE
STATE OF INDIANA

August 1, 2007

The Honorable Vernon J. Ehlers
United States House of Representatives
2182 Rayburn House Office Building
Washington, DC 20515

Re: Election Crimes: An Initial Review and Recommendations for Future Study

Dear Congressman Ehlers:

I have recently reviewed the EAC's Vote Crimes report as well as my office file related to Indiana Secretary of State Todd Rokita's participation on the Voting Fraud-Voting Intimidation Working Group. My file consists mainly of the EAC's December '06 report, the research summaries from Job Serbrov and Tova Wang (EAC Contractors), the transcript of the May 18th 2006 Working Group meeting and the EAC Contractor's *unpublished, preliminary, predecisional draft* report. There are some significant inconsistencies between the transcript and the draft report, and I wish to note these for the record.

One mandate of the Help America Vote Act of 2002 (HAVA) required the Election Assistance Commission (EAC) to "*develop national statistics on voter fraud and develop methods of identifying, deterring, and investigating methods of voter intimidation.*" The research assignment given to EAC Contractors was to find out if statistics on vote fraud and intimidation existed (ie: was there data from which statistics quantifiable in numbers or metrics could be derived?) If it was found that such data was unavailable or insufficient for the development of "national statistics" then it followed logically that the contractors would develop recommendations for generating these statistics.

In the introduction section of their *preliminary, predecisional draft report* to the EAC, the EAC Contractors indicate that the scope of their project is to "determine the quantity and quality

of vote fraud and voter intimidation that is present on a national scale". Their self-assignment of task is very different than the primary HAVA directive "to develop national statistics on vote fraud..." This is evident upon reading the following sections from the transcript of the working group meeting.

- Rokita: " Can you just review for me what the purpose of gathering all this was, in relation to our statutory guideline here? (T at P. 35) Ms. Wang offered the following ambiguous response: "Well, we're trying to just sort of get the lay of the land on this issue." (T. at P. 35)
- Rokita then asked Ms. Wang if she had asked the people she interviewed for "ideas for developing nationwide statistics and methods of identifying ...or deterring...voter intimidation?" (T. at P. 36) Ms. Wang responded "No". She added "we asked every single person we talked to what their thoughts were on how to improve the system, what ought to be done to reform it and solve some of these problems." (T. at P. 36)
- Ms Wang advised the working group that she and Mr. Serebrov "limited...(the national statistics) aspect...to talking to people who were basically political scientists, who I (Ms. Wang) think are in the best position to tell us what is a scientifically sound method for trying to get some kind of accurate take on this." (T. at P. 36)
- Later Secretary Rokita *again* asks the Working Group about the enabling legislation for this research. He even reads HAVA section 241 verbatim into the record. (T. at P. 51) Rokita said "Congress will assume voter fraud existed, and it is asking the EAC to develop nationwide statistics and methods of identifying, deterring (voter fraud and intimidation)." (T. at P. 52) Ms. Wang agrees with Secretary Rokita's assessment responding: "(T)hat's what we are going to try to do...(W)e're not making the assumption...(W)e're not saying there isn't fraud." (T. at P. 52). However Wang immediately qualified her position, stating: "I don't think that you can get to the point of identifying these other matters...without first doing research to find out what is going on." (T. at P. 52)

Thor Herne, another member of the group, questioned whether the consultants appreciated that the objective was to produce "a methodology for tracking quantifying, and reporting these

kinds of incidences going forward." (T. at P. 55) This prompted the following exchange with Ms. Sims of the EAC:

- Ms. Sims: Well you may not even have to come up with a methodology. What we're looking for, how we meet this requirement. Or as I said, we also serve as a clearinghouse for the administration of federal elections. There may be things that relate to the issue of voting fraud. There may be best practices in certain areas that we maybe should be looking at that we haven't already started to look at.
- Mr. Hearne: So the EAC is coming in, the Working Group says, give us some ideas.
- Ms. Sims: Where we need to go.
- Mr. Hearne: Tracking as we go through.
- Ms. Sims: Please don't use a four-letter word when you say where we need to go. (T. at P. 55-56)

At this point the exchange between Mr. Hearne and Ms. Sims is interrupted, and the Working Group discussion turns to another subject.

- Benjamin Ginsberg also asked the researchers: "(W)hy is there academic work being done about this when, in fact, in six months, you have got the ultimate laboratory...(W)hy would you not come up with some sort of methodology to go into all the polling places where there may be an issue...and take a look at it." (T. at P. 61)
- Mr. Hearne agrees: "I think Ben's discussion is a good one...(T)he point he is saying, we have a great laboratory coming up in terms of an election...(I)f you're going to need to develop some methodology to study it, you can develop the methodology looking forward to the event." (T. at P. 63)
- Robert Bauer questions whether the use of partisan researchers at the polls would be acceptable.
- Ginsberg responds: "(T)he point was, you're not looking to monitor the sanctity of American elections...(W)hat you're looking for is valid data to collect." (T. at P. 65)

At the Working Group session, the EAC Contractors acknowledged many deficiencies in their data gathering and as a result, that conclusions would be hard to come by:

- Serebrov: Discussing his survey of state and federal court cases: "So we threw out 99 percent of those cases...(W)hat we have are a number of charts with few cases, surprisingly few cases...(A)nd my suggestion at the next phase,...(that)...they do a nationwide sampling of state cases on the district court or circuit court level to find out what's really going on." (T. at P. 39)
- Secretary Rokita asked how a nationwide study would be conducted.
- Mr. Serebrov replied *inter alia* "(Y)ou're looking at a lot of work, a lot of money going into this, but what we found at that *sic*...(this)...level is inadequate to draw conclusions, unfortunately." (T. at P. 40)
- Serebrov: "(w)e were limited in both time and funds...(S)o what we were able to deliver *sic* (deliver) is just a peek at what's going on." (T. at P. 53-54)
- Serebrov: "One area that we didn't touch is complaints or potential voting fraud having to do with the machines themselves." Ms. Wang added: "Thank God." (T at P. 54)
- Wang: "...for the purposes of data collection and doing research, I am curious if anyone knows which states are the ones that are already collecting data, county level data, at the state level, because my impression is that they are not doing that, but you're telling me something else..." (T. at P. 172)
- Kathy Rogers reported that in Georgia the state election board has authority to investigate voting fraud cases.
- Ms. Wang replied: "I wish that every state did what you did, then we could just add them all up...(O)ne thing we found, of course, almost no states do that...(A)lso we spoke to your successor, John Tanner...and the Federal Government, the Department of Justice keeps a database of what comes in but they also would not release that information to us...(A)nd they also would not release to us any more than a few dozen of the observer reports, which we also think might be helpful." (T at P. 77-78)
- Wang: "You might want to look at the summaries of the interviews, because a number of people have said that they have given all this information to the Department of Justice, and they haven't done anything." (T. at P. 91)

- Craig Donsanto: "And the other thing that bears in mind, we cannot prosecute everything...(W)e try to , based on the degree of severity of the event and the need for deterrence." (T. at P. 91)
- Serebrov: "I think right now we need to bear down on the local level...(S)ometimes those are missed in the Nexus research...I think we need to plug the holes. (T at P. 148)
- Ms. Sims: "... (T) hats a major question of this project , is any of it quantifiable? I don't think you're ever going to come up with a number, so how do you get at it?" (T at P. 58-59) To which Secretary Rokita replied: "(M)aybe at the end of the day, we decide we stop spending taxpayer money or it's going to be too much to spend to find that kind of data..." (T. at P. 59) Serebrov: "I think we're going to find that's the answer." (T at P. 59)

The EAC Contractors *acknowledged* that quantifying the extent of vote fraud might be impossible - *not* because fraud doesn't exist, but because of the nature of the crime and a system of law enforcement unprepared and unaccustomed to spotting and dealing with it. For example:

- Ms. Rogers: "That's not going to work unless you actually go back to whatever the voter filled out because the election official may have actually tagged that dead voter by mistake...(T)here is a huge opportunity for error. (T at P. 149)
- Wang: "I would greatly broaden the scope of the type of interviews that we've done (with) the local people, and also to include the federal district election officers and district attorneys..." (T at P. 144)
- Wang: "I also wanted to talk about both the election protection materials and also the 1-800 My Vote analysis... (a data base of over 200,000 phone calls and 50,000 audio phone messages)... I thought that looking at data further might be useful." (T at P. 145-146)
- Wang: "I also would love to be able to get more and analyze more data and information from the Department of Justice...they did not feel comfortable sharing with us." (T at P. 146)
- Wang: "The election data which we also were not able to get...(included)... reports done by the district election officers who are in every jurisdiction." (T at P. 147)

- Wang: "I also think it would be great to attend the next session of the ballot accessing symposium". (Mr. Donsanto replies: "No, that is not possible...(T)hat is classified...(B)elieve me, there is no chance." (T at P. 146)
- Wang: "I think it would be useful to do a complete analysis of the Federal Observer errors from 2002, 2004 and 2006...(there are)...millions of them, I know, but there might be some way to do a sampling or something." (T at P. 147)
- Serebrov: Other helpful items not studied would include "a survey of state laws", "(a) survey of district court cases" and "looking at local newspapers in various states and running searches on election issues." (T at P. 148)
- Wang: "(w)e actually made the decision not to go through election protections data during this phase because of the problem of trying to weed out allegation from reality." (T at P. 155-156)
- Serebrov: (addressing EAC General Counsel, Julie Thompson-Hodgkins) (D)o you know which states have (voter fraud units)... or which states don't?" (indicating that the research had not included reports from states voter fraud unit investigations) (T at P. 157)
- Wang: (referring to how states handle vote fraud complaints) "(W)e asked that of all of the (election) administrators we interviewed, and we got a different answer from everybody." (T at P. 158)
- Mr. Weinberg asked (twice) if there was any information that the contractors missed or couldn't get to. (T. at P. 41) The initial responses were as follows:
- Wang: "That's what I need to ask you."
- Serebrov: "That comes later, we ask you that..." (T. at P 41) Mr. Serebrov eventually offered that "(O)ne thing we left out were allegations...(W)e did not handle any particular allegations (of voter fraud)."
- The reasoning supplied by Ms. Wang was because "(I)t was too much." (T. at P. 44)
- On further prompting by Mr. Herne, the EAC Contractors noted that some allegations (those which resulted in law suits or those which "made it into the papers" - and were thus picked up in Ms. Wang's Nexus media search, would have come into their study.
- With respect to vote fraud and intimidation allegations contained within the files of state election administrators, Serebrov suggested that "if they are categorized, if there is

enough information, that may or may not be...(additional research)...that one wants to do (consider). (T. at P. 46)

- Kathy Rogers, speaking on absentee ballot fraud investigations: "Unfortunately, it takes so long to bring these cases to a resolution, we find, time after time, by the time the case goes to an actual court, a lot of these folks no longer tell the same story. A year or two goes by, and those people who were coerced, they are just not saying anymore...I think a lot of cases closed simply because you are unable to have the data that you need to follow through.
- Wang: "I would be curious to know the extent states are implementing administrative complaint procedures under HAVA, because I don't think they all are...(E)ven if they informed HAVA, I don't think people even know about it to use it, and I think maybe that's something else that's not my bailiwick, but something ought to be looked at. " (T. at P. 160)
- Kathy Rogers indicated that in Georgia election administrators are swamped with complaint calls on election day: "(W)e could get anywhere from a hundred to 200...(W)hat we do now...we have so many people taking calls on Election Day, and when you can't get through to say our office or a count office, then even the calls are spilling over from election agencies into other divisions of the Secretary of State's Office...(B)ut we take all of these complaints and follow through...(I)t is time-consuming and it is taking up more time and energy than we have ever put to it in the past." (T. at P. 163)

The EAC Contractors repeatedly pointed out to the working group *that they lacked the academic research skills of political scientists or statisticians*:

- Wang: "(I)n phase 2 it will be necessary to have someone of the nature of the people I interviewed involved in the process, someone who really knows how to do statistical work and do these kind of studies." (T at P. 109)
- Wang: "And also, again, as I mentioned before, I think it's important that we have an academic institution or individual that focuses on statistical methods for political science research." (T at P. 147)

- Wang: "Well, it would have to have some sort of random survey that a political scientist would know how to devise." (T at P. 114)
- Wang: "I would want to talk to a political scientist about that...(T)hey can figure out ways of doing it, margins of error. (T at P. 151)

On the issue of the application of *risk analysis* as a research methodology, Rokita questioned the critical assumption of risk analysis, specifically, that in an election, people will act rationally. (T. at P. 135-136) Others in the Working Group indicated by their remarks, that the concept and its application to the study of vote fraud was not well understood:

- Mr. Bauer: Risk analysis...based on the assumption that people act rationally in this area, what we would most expect to see, what kinds of fraud is most potentially likely, and then just rank it...and it can be marked up with other numbers to bolster their significance.
- Mr. Ginsburg: Could you figure out how to do the risk analysis?
- Mr. Bauer: I don't know, and I don't have any expertise.
- Ms. Wang: I started to get books on risk analysis but I didn't want to read about the diseases and environmental calamities.
- Mr. Weinberg: I thought it was interesting, although I didn't understand what it said. (T. at P. 130-131)

EAC Consultants shared the position, that the objectivity and credibility of *some* political scientists might be open to question:

- Ms. Wang: We could get someone who is actually an expert on risk analysis here, rather than someone who is a political scientist who focuses on elections...(T)hat would give even a better neutrality color to it. (T. at P. 137)
- Ginsberg: "*We all agree* that there is a problem with fraud and intimidation taking place in elections...(T)he question is how many prosecutors are there on a regular basis that show that there is either fraud or intimidation? (T. at P. 184)

- Mr. Dosanto responds: "I don't think that (prosecutions) is a measure of anything...(T)here is a hell of a lot more out there than we ever find, and there is a hell of a lot more, we don't have the resources." (T. at P. 184-185)
- Ginsberg: "(A)nd rumors about it are greater than the actuality. (T. at P. 185)
- Donsanto: "(T)here is a lot more out there than we ever catch, and the rumors are even more." (T. at P. 185)
- Finally, Peggy Sims indicated at the close of the Work Group meeting that "(G)enerally speaking, it (would have been) wiser to get the Working Group further in the beginning...(W)c are bringing you in as the tail group...." (T. at P. 192)

Though the contractors admitted their work was lacking in thoroughness, scientific rigor and statistical analysis, they seemed more than willing to solicit and draw broad conclusions about election crimes based on their "research":

- Wang: "(g)iven the research and the findings we have, what at this point do you (the working group) think we can say about how much fraud and intimidation there has been since the 2000 election, and how much are certain frauds being committed as opposed to others?" (T. at P. 41)
- Mr. Greenbaum: "(M)ost of (the deceptive practices)...(are) happening outside of the polling place." (T. at P. 50)
- Ms. Wang responded: "I would agree with that...(T)hat's what almost everyone says."

Despite lack of any statistical data to the point, the EAC Contractors' preliminary, predecisional draft report states that among interviewees -- 30 people in total -- "(T)here is virtually universal agreement that absentee ballot fraud is the biggest problem, with vote buying and registration fraud coming in after that" and "There is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than is claimed, including voter impersonation, "dead" voters, non citizen voting and felon voters." (Serebrov and Wang report at P. 7)

These excerpts from the transcript of the EAC Voting Fraud-Voter Intimidation Work Group meeting amply demonstrate that:

1. Not all of the conclusions about voter fraud and intimidation reported by the EAC Contractors in their preliminary, predecisional draft report are accurate or the consensus opinion of the Working Group.
2. The focus of the contractors' research deviated substantially from the statutory HAVA mandate.
3. The data gathered by the contractors lacked sufficient depth, and breadth upon which to form the basis for the conclusion that "there is little polling place fraud", or that "absentee ballot fraud is the biggest problem"¹
4. That in the compilation and editing of the December, 2006 EAC Vote Crimes Report, the EAC Commissioners, Advisory Board, Standards Board and staff took appropriate cognizance of deficiencies in the contractors' research and conclusions.

It is the position of the Office of the Indiana Secretary of State that the EAC should take the initiative to assure that *the record* on this matter (including published media reports)¹ is clear and correct. The issue of potential public misperceptions regarding conclusions which can *fairly* be drawn from the preliminary research, and the observations and opinions of the Vote Fraud-Voter Intimidation Work Group should be addressed as well. One step the EAC should follow to accomplish this would be to publish the transcript of the Working Group session on its web site, so that the public can see and appreciate the nature of the contractors' preliminary draft report.

Very truly yours,

Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State

¹ It has become quite apparent that in the arena of "political science vs. public opinion" such as this case, that the accuracy of media of is a critical issue. To wit: a substantial part of Serebov and Wang's research consisted of collecting and analyzing newspaper articles about vote fraud. If vote fraud researchers are going to base their conclusions on "newspaper articles" than it is critical that journalists be held to a high standard with respect to "getting the story right."



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Associate Professor

August 2nd, 2007

The Honorable Vernon J. Ehlers, Ranking Member
Committee on House Administration

Re: Written Testimony of Jeffrey Milyo, Ph.d.

I have reviewed the report titled "Voting Fraud and Voter Intimidation" by Job Serebrov and Tova Wang; in this statement I describe the quality of the work completed to date and the potential value of the proposed research described in the Serebrov and Wang report.

I have approached this task as I would when refereeing a professional study or a grant proposal. As a social scientist, I expect certain minimal standards to be met in a research project or research proposal. Specifically, authors should motivate their analysis; the data collection and analytical methods should be clearly and completely described; the strengths and weakness of the data and methods should be acknowledged and conclusions should be well-supported by the analysis. Similarly, proposals for future research should be articulated in detail, describing the motivation for the study, the data to be collected and the analytical methods, as well as strengths and weaknesses and the potential value-added of such endeavors.

The consultants' report fails to meet these criteria. The analyses conducted by the authors are not well-motivated or well-executed, nor are the data, methods and findings described in appropriate detail. Further, the proposals for future research are cursory at best. Given this, the report by the consultants does not allow any conclusions regarding the incidence of voter fraud or intimidation, nor does the report instill confidence that the consultants are competent to lead future empirical research on these questions.

This should not be construed as a criticism of the objectivity of the consultants, nor is it a commentary on their expertise or professionalism within their own bailiwick. Rather it is apparent from their report that the consultants do not have the appropriate expertise to design or conduct a scientific analysis of the extent of voter fraud and intimidation. It is therefore not surprising that when judged by the standards of a scientific report, the consultants work product is deficient in a number of respects.

I first briefly describe my qualifications as a reviewer; then I review the Serebrov and Wang report in more detail.

1. Qualifications

I am a tenured associate professor in both the Truman School of Public Affairs and the Department of Economics at the University of Missouri in Columbia, Missouri; I am also an adjunct professor in the department of Political Science at the University of Missouri. I have

several other professional affiliations; these include: senior fellow at the Cato Institute in Washington, D.C., the Hanna Family Scholar in the Center for Applied Economics at the University of Kansas School of Business; and academic advisor to the Center for Competitive Politics in Arlington, Virginia. Previously, I have been on the faculties of the Harris School of Public Policy at the University of Chicago and Tufts University in Massachusetts. I have also been a visiting scholar at the Massachusetts Institute of Technology, Washington University, Yale University and most recently, Stanford University. My curriculum vita is attached to this letter.

My area of academic expertise is American political economy, including the empirical analysis of the effects of political institutions. My scholarly research has been published in a number of leading peer-reviewed journals, including, the *American Economic Review*, the *Quarterly Journal of Economics*, the *Journal of Law and Economics*, the *Journal of Public Policy Analysis and Management*, *State Politics and Policy Quarterly* and the *Election Law Journal*. I frequently serve as a peer-reviewer for the leading journals in both economics and political science, including the *American Economic Review*, the *American Political Science Review*, the *American Journal of Political Science*, the *Journal of Human Resources*, the *Journal of Law and Economics*, the *Journal of Law, Economics and Organization*, the *Journal of Political Economy*, the *Quarterly Journal of Political Science*, and the *Journal of Politics*, as well as for several national grant-making organizations.

2. Review of Serebrov and Wang

The consultants seek to describe the “quantity and quality” of voter fraud and intimidation in U.S. elections, and to propose future research on this topic; however, the authors note up front that their report is neither comprehensive nor conclusive. The report first describes five avenues of inquiry undertaken by the consultants: interviews, a review of news reports, a review of legal cases, a review of the existing literature, and conversations with political scientists; the consultants then present several recommendations and summarize their interactions with a working group. I discuss each of these sections of the report in turn.

Interviews:

The consultants interviewed several persons with some relevant expertise on voter fraud and intimidation. However, the universe of persons considered for interviews omits political operatives that might have first-hand knowledge of these activities (and might be willing to discuss at least the tactics employed by the opposite party). The selection process from this universe was not random; the interview questions are not described, and there is no indication that the consultants used a scripted set of questions or otherwise conducted the interviews in accordance with any systematic investigative methods. Further, the consultants do not describe the number of persons interviewed in the main text, nor do they make any attempt to control for the background or political leanings of interviewees. So, while these interviews might provide some useful background information for the consultants, they otherwise do not constitute a scientific analysis. It is therefore disconcerting that the authors describe this exercise as one of their research activities and even include a summary of interviewer comments in their report.

In writing up their summary of the interviews, the consultants do not describe their motivation for doing interviews or their reasons for selecting particular persons, nor do the authors provide any breakdown of the number of persons interviewed with particular experience, political leanings, etc. Most importantly, the authors do not offer any cautions about drawing conclusions based upon this non-scientific exercise. In fact, this particular failure has greatly contributed to the public controversy that has led to this hearing.¹

News Reports:

The consultants next conduct a Nexis search of news reports on voter fraud and intimidation over a five year period. Again, the authors do not explain why this exercise would be useful, nor do they provide much detail on the search terms employed, the number of articles uncovered, the distribution of these articles across newspapers, region, type of election, etc. The authors do not describe the number and type of newspapers that Nexis covers over this time period or whether this coverage is constant throughout the time period. Nor do the authors otherwise discuss the representativeness of these news reports, or provide any systematic analysis of these reports.

Moreover, the consultants' description of this exercise is maddeningly vague. For example, the authors state that they compiled an "enormous list of possible Nexis search terms" (how so, how many and what were they?) and that the consultant Wang subsequently chose combinations of these terms that would yield "virtually every article" on each topic of interest (how so, what where they and how could she know this with such certainty?). When describing the number of articles and allegations made under each category of voter fraud and intimidation, the authors do not provide any descriptive statistics; instead, they merely relate that "many" or a "few" articles allege such and such. For example, the authors note that there were a "surprising number" of articles about vote buying, "numerous reports" of deceptive practices, and "surprisingly few" articles on noncitizen voting. From such statements, it is impossible to discern how many incidents of voter fraud and intimidation are being reported. Finally, the authors do not explain whether each article is an independent observation or not; for example, do all of the articles on deceptive practices refer to the same incident, or is each describing several unique incidents across the country? This would be very useful information, so it is unfortunate that the consultants did not attempt to quantify the allegations of voter fraud and intimidation in a more sensible and systematic fashion.

Existing Research:

The consultants state that there is little scientific research on voter fraud and intimidation and that their review covered the "landscape of available sources." It is unclear what exactly this phrasing means, but the consultants review of existing research does not include a single

¹In summarizing the opinions of their interviewees, the consultants state that "there is widespread but not unanimous agreement that there is little polling place fraud ..." While it is clear from the context of the report that this statement in no way represents a conclusion that the authors reached based upon a systematic analysis of evidence, it has been construed as such in several recent press reports. In fact, the only conclusion that the authors make in this respect is in their description of the existing literature on voter fraud and intimidation; in that section of the report, the consultants note that there is "tremendous disagreement about the extent to which polling place fraud ... is a serious problem." So, while it is not fair to blame the consultants for poor reporting by journalists, this confusion might well have been avoided had the authors taken more care in writing the report.

academic study (i.e., from a peer-reviewed journal or a university press book). This is stunning, since there is in fact a longstanding political science literature on voter fraud, intimidation and suppression, albeit of a more historical nature. However, a review of these studies would be very valuable in understanding what types of voter fraud and intimidation might still occur in the present, how such activities might be measured or analyzed, and what kinds of policies might prevent such activities in the future. In addition, there is a voluminous literature on voter participation, citizen trust in electoral institutions and public opinion on voter fraud and intimidation that should be reviewed in connection with this study. There is also a fairly well-developed body of theoretical literature on voting that might inform this analysis, although it is difficult to know how much so absent an actual review of the academic literature. The failure to review any of the relevant scholarly literature is a major shortcoming of the Serebrov and Wang report.

Not only do the consultants ignore the relevant social science literature, their review of the reports of advocacy groups is cursory and not even-handed. For example, the consultants dismiss most of the popular accounts of voter fraud and intimidation as being based upon anecdotes, but then praise anecdotal and non-scholarly work by Lorie Minnite and Laughlin McDonald as systematic analyses of voter fraud and intimidation, respectively.² The consultants may have some rational basis for evaluating the various non-academic studies in this manner, but if so, they do not describe it. For example, it might have been useful had the authors conducted a meta-analysis of the existing literature, or otherwise made some attempt at a consistent analysis of these existing studies. Absent this, it is impossible to discern how the consultants evaluated popular accounts and advocacy reports, and whether this was done in a coherent manner.

Review of Legal Cases:

The consultants conducted a Westlaw search for cases relating to voter fraud and intimidation; this exercise exhibits very similar flaws as does the Nexis search described above. The authors do not describe their search terms, the time period examined, or the coverage of Westlaw during the time period examined. The authors do not provide details on the types of cases reviewed, only that “few applicable cases were found.” Also, the authors did not conduct a systematic analysis of state trials.

Again, the authors do not discuss the motivation for this exercise, or offer any cautions about the representativeness of trials versus underlying crimes. For example, in legal research it is well-understood that only a small fraction of cases ever go to trial and that these cases are not representative of those filed; the extent to which this might be true for cases relating to voter fraud and intimidation and what this might mean for this type of analysis is left unexplored.

Methodologies:

In this section of their report the consultants summarize the content of conversations with an unknown number of political scientists. This is potentially the most useful aspect of this report,

² The consultants refer to a study by Lori Minnite, but do not cite any sole-authored work by Minute in their references; I assume that the authors intended to cite the report by Minnite and Callahan that is included in the reference list.

but the proposed research projects described in this section are so sketchy as to be of little value. The consultants should have gone into much greater detail about the proposed studies, describing the exact data collection procedures and expected costs, the definition and measurement of key dependent and independent variables, the statistical methods to be employed, and the equations to be estimated. As things stand, it is impossible to evaluate the feasibility, cost and potential value-added of the proposed studies.

Recommendations:

The consultants make a number of recommendations regarding future research. Some of these focus on additional interviews, case studies, and reviews of press reports. Such activities may hold some limited value, but most likely only if conducted by well-trained social scientists. Additional efforts by the consultants along these lines would probably not be fruitful. However, the final two recommendations made by the consultants do merit further comments.

First, "Recommendation 8" is that the EAC should employ an "academic or individual to conduct statistical research"; this recommendation is an understatement. The numerous shortcomings of the Serebrov and Wang report demonstrate quite clearly that the EAC should seek out several scholars with substantial technical expertise in designing and conducting empirical studies.

Second, "Recommendation 9" is a statement by Wang that legislation should be adopted that expands the set of activities that can be prosecuted as voter intimidation. This policy recommendation is out of place, given that the report is incomplete and inconclusive. Rational public policy should be based on an objective evaluation of the relevant scientific evidence; since this report is not a scientific study, it is quite inappropriate and irresponsible to include any policy recommendations. Further, even taking the evidence presented in this report at face value, it is unclear by what logic such a reform would be warranted for the purpose of preventing voter intimidation, but not voter fraud.

Conclusion:

The question of just how much fraud and intimidation exists in current American elections and how best to deter such activities merits serious study. However, the Serebrov and Wang report does little to advance our understanding of these difficult and contentious issues. Nevertheless, their report does offer one very important lesson for the future: research projects sponsored by the EAC should be selected, conducted and peer-reviewed by teams of well-qualified social scientists.

Sincerely,

Jeffrey Milyo



July 31, 2003

The Honorable Vernon J Ehlers
 Ranking Member
 Committee on House Administration
 1309 Longworth Building
 Washington, D.C. 20515

Re: Voter Identification Laws

Dear Representative Vernon J. Ehlers:

I am writing to submit a Heritage Foundation study to be included in the record of the Committee on House Administration's "Oversight Hearing on the Election Assistance Commission." The Heritage Foundation study, "Do Voter Identification Laws Reduce Voter Turnout: A New Look at the Data," is a reanalysis of the data used by the Eagleton Institute of Politics at Rutgers University. The Eagleton Institute study found that more stringent voter identification requirements appeared to reduce voter turnout in 2004. In the media, their study has been cited as demonstrating that the strengthening of voter identification requirements to reduce fraud has the side-effect of suppressing minority voter turnout.

This Heritage Foundation study attempts to replicate the part of the Eagleton Institute study that used the publicly available November 2004 Current Population Survey. This analysis was done because several aspects of the Eagleton Institute study cast doubt on the validity of its findings. First, the Eagleton Institute used one-tailed hypothesis tests instead of the more commonly accepted two-tailed tests. The one-tailed test allows researchers to double their chances of finding statistically significant results. Second, the 2004 voter identification laws of certain states were misclassified. Third, some of the variables used to predict the decision to vote were used inappropriately.

Controlling for factors that influence voter turnout, voter identification laws largely do not have the claimed negative impact on voter turnout based on state-to-state comparisons. When statistically significant and negative relationships are found, the effects are so small that the findings offer little policy significance. White survey respondents in photo identification states are 0.002 percent less likely to report voting than white respondents from states that only required voters to state their name. African-American respondents in non-photo identification states are 0.012 percent less likely to report voting than African-American respondents from states that only required voters to state their name.

In other cases, no effect was found. In general, respondents in photo identification and non-photo identification states are *just as likely* to report voting compared to

respondents from states that only required voters to state their name. African-American respondents in photo identification states are *just as likely* to report voting compared to African-American respondents from states that only required voters to state their name. Hispanic respondents in photo identification states are *just as likely* to report voting compared to Hispanic respondents from states that only required voters to state their name.

I hope you will find this study useful for your oversight activities regarding the Election Assistance Commission. If you have any questions about the study please contact me.

Sincerely,



David B. Muhlhausen, Ph.D.
Senior Policy Analyst

Do Voter Identification Laws Reduce Voter Turnout? A New Look at the Data

*David B. Muhlhausen, Ph.D., and Keri Weber Sikich
The Heritage Foundation
July 31, 2007*

OVERVIEW

The 2000 presidential election sparked a firestorm of debate relating to election reform in the United States. Since then, academics, the media, and elected officials have proffered opinions and implemented policies related to this important political issue. Topics that have been addressed in recent years range from modernizing voting machines and updating voter registration rolls to implementing stricter identification requirements for voting.

In 2002, Congress passed the Help America Vote Act (HAVA).¹ HAVA affects only federal elections and, among other things, requires that the states provide for provisional voting; create a computerized, centralized list of registered voters; and ensure that new voters who register by mail present identification before being allowed to vote in person. HAVA established the Election Assistance Commission (EAC) to serve as “a national clearinghouse and resource for information and review of procedures with respect to the administration of federal elections.”² Additionally, many state legislatures have enacted their own election reform legislation.³

Of the many election reforms currently being considered, one that has incited some of the most cantankerous debate is that of voter identification at the polls. For many, the idea of requiring voters to present identification in order to vote is anathema, tantamount to the poll taxes that were once used to prevent African-Americans from voting.⁴ They contend that requiring identification at the polls will lead to lower voter turnout, especially among the poor, certain minorities, and the elderly. For others, such as the Protect Arizona Now organization that lobbied in favor of identification requirements for Arizona voters, the problem of voter fraud makes voter identification requirements a common-sense solution.⁵ The standard argument goes that if a person has to show identification to board a plane or cash a check, why shouldn't he have to do the same in order to vote? Additionally, the proponents of stricter voter identification requirements argue that such a

¹ Public Law 107-252.

² Election Assistance Commission, “About the EAC,” at www.eac.gov/about.asp?format=none (June 28, 2007).

³ For a review of recent state legislative activity on voter identification laws, see National Council of State Legislatures, “Requirements for Voter Identification,” February 1, 2007, at www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm (July 23, 2007).

⁴ John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (San Francisco: Encounter Books, 2004), p. 137.

⁵ Protect Arizona Now, “Background Information,” at www.pan2004.com/background.htm (July 24, 2007).

policy would bolster the public's faith in the legitimacy of elections and lead to greater voter turnout, not less.

Both sides raise valid concerns. However, even a cursory glance at the literature on voter identification requirements shows that there is a dearth of empirical research on this issue. While there have been a few studies to address the effect of voter identification requirements using election data,⁶ more research is needed in order to appropriately assess the legitimacy of either side's claims.

In response to this debate, the EAC awarded a grant to Rutgers University's Eagleton Institute of Politics and the Moritz College of Law at Ohio State University to study voter identification requirement laws. The resulting study, *Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002*,⁷ included a statistical analysis of the effect of voter identification requirements on voter turnout during the 2004 election by Professor Timothy Vercellotti of the Eagleton Institute.⁸ A new version of the analysis with Timothy Vercellotti and David Anderson as authors was presented to the 2006 American Political Science Association conference.⁹ Hereinafter, this study will be referred to as the "Eagleton Institute study."

The Eagleton Institute study found that more stringent voter identification requirements appeared to reduce voter turnout in 2004.¹⁰ In the media, their study has been cited as demonstrating that the strengthening of voter identification requirements to reduce fraud has the side-effect of suppressing minority voter turnout.¹¹

This Center for Data Analysis report attempts to replicate the part of the Eagleton Institute study that used the publicly available November 2004 Current Population Survey (CPS).¹² This analysis was done because several aspects of the Eagleton Institute study cast doubt on the validity of its findings:

⁶ Timothy Vercellotti and David Anderson, "Protecting the Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout," American Political Science Association conference paper, Philadelphia, Pa., August 31–September 3, 2006, and John R. Lott, Jr., "Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates," Department of Economics, SUNY Binghamton, August 18, 2006.

⁷ *Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002*, Eagleton Institute of Politics, Rutgers, The State University of New Jersey, and Moritz College of Law, Ohio State university, June 28, 2006.

⁸ Timothy Vercellotti, "Appendix C: Analysis of Effects of Voter ID Requirements on Turnout," in *Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002*.

⁹ Vercellotti and Anderson, "Protecting the Franchise, or Restricting It?"

¹⁰ *Ibid.*

¹¹ Christopher Drew, "Lower Voter Turnout Is Seen in State that Require ID," *The New York Times*, February 21, 2007, p. A16; Richard Wolf, "Study: Stricter Voting ID Rules Hurt '04 Turnout," *USA Today*, February 19, 2007, p. A5; Matthew Murray, "EAC Blasted Again for Burying Study," *Roll Call*, April 9, 2007; Tom Baxter and Jim Galloway, "Wonk Alert: Study Says the Heavier the Voter ID Requirements, the Lower the Turnout," *Atlanta Journal-Constitution*, February 21, 2007, Metro News.

¹² Current Population Survey, November 2004: Voting and Registration Supplement, machine-readable data file, conducted by the Bureau of the Census for the Bureau of Labor Statistics, 2005.

- The Eagleton Institute used one-tailed hypothesis tests instead of the more commonly accepted two-tailed tests. The one-tailed test allows researchers to double their chances of finding statistically significant results.
- The 2004 voter identification laws of certain states were misclassified. For example, Arizona and Illinois were incorrectly classified as requiring voters to provide identification and state their name for authentication, respectively. However, in 2004 Arizona only required voters at polling stations to sign their name for authentication, while Illinois required poll workers to match the signatures of voters.
- Some of the variables used to predict the decision to vote were used inappropriately. For example, the Eagleton Institute study used the November 2004 CPS family income variable, which is an ordinal variable of unequal income ranges, as an interval-ratio variable. Using categorical variables as ordinal variables can lead to estimation problems.

After addressing these issues, our reanalysis finds that some of the original findings of the Eagleton Institute study are unfounded. Controlling for factors that influence voter turnout, voter identification laws largely do not have the negative impact on voter turnout that the Eagleton Institute suggests. When statistically significant and negative relationships are found, the effects are so small that the findings offer little policy significance. For example, our analysis indicates that:

- White survey respondents in photo identification states are 0.002 percent less likely to report voting than white respondents from states that only required voters to state their name.
- African-American respondents in non-photo identification states are 0.012 percent less likely to report voting than African-American respondents from states that only required voters to state their name.

In other cases, no effect was found.

- In general, respondents in photo identification and non-photo identification states are *just as likely* to report voting compared to respondents from states that only required voters to state their name.
- African-American respondents in photo identification states are *just as likely* to report voting compared to African-American respondents from states that only required voters to state their name.
- Hispanic respondents in photo identification states are *just as likely* to report voting compared to Hispanic respondents from states that only required voters to state their name.

BACKGROUND

When discussing voting behavior, it is important to consider the factors that influence whether an individual votes or not. According to the “Calculus of Voting” model, an individual will vote when the rewards from voting are positive and will abstain when they are not. The equation for the Calculus of Voting model is as follows:

$$R = PB - C + D.$$

The rewards (R) from voting are determined by multiplying the benefits (B) an individual receives when his preferred candidate wins over a less preferred candidate by the probability (P) that his vote will make a difference plus the benefits one receives from voting as an act of fulfilling one’s duty or civic obligation (D) minus the costs of voting (C).¹³ This is the standard, rational model of voting and will be used to inform the following discussion of voter identification requirements and their effect on voter turnout.

The voter identification issue is often framed as being torn between the opposing aims of “access and integrity.”¹⁴ By this we mean that it is commonly perceived that while voter identification laws may be effective at preventing ineligible individuals from voting (integrity), they may have an adverse effect on the ability of every eligible voter to vote (access). There have been only a few empirical studies on the impact of voter identification requirements,¹⁵ but this does not translate into a lack of opinions on this topic.

Advocates for more stringent voter identification laws contend that this reform is vital to prevent voter fraud.¹⁶ As more and more elections are won by slim margins, proponents of identification requirements argue that the chances are greater that voter fraud could affect election outcomes.¹⁷ The potential for a small number of voters to have a significant impact on the outcome of an election became all too evident in the 2000 presidential election. Given that George W. Bush was declared the winner in Florida (and the next President) by a margin of 537 votes, it follows that even a small number of fraudulent votes (537+1) would matter a great deal.¹⁸ In 2004, there were allegations of

¹³ William Riker and Peter Ordeshook, “A Theory of the Calculus of Voting,” *The American Political Science Review*, Vol. 62, No. 1 (March, 1968), pp. 25–42.

¹⁴ Spencer Overton, “Voter Identification,” *Michigan Law Review*, Vol. 105, No. 631 (February, 2007), p. 636.

¹⁵ Lott, “Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates,” and Vercellotti and Anderson, “Protecting the Franchise, or Restricting It?”

¹⁶ Protect Arizona Now, “Background Information.”

¹⁷ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, September 2005, p. 18, at www.american.edu/iafer/report/full_report.pdf (July 24, 2007). Additionally, John Fund writes that “Election fraud...can be found in every part of the United States, although it is probably spreading because of the ever-so-tight divisions that have polarized the country and created so many close elections lately.” Fund, *Stealing Elections*, p. 5.

¹⁸ M.V. Hood III and Charles S. Bullock, “Worth a Thousand Words? An Analysis of Georgia’s Voter Identification Statute,” April 2007, p.1, at [http://electionlawblog.org/archives/GA%20Voter%20ID%20\(Bullock%20&%20Hood\).pdf](http://electionlawblog.org/archives/GA%20Voter%20ID%20(Bullock%20&%20Hood).pdf) (July 24, 2007).

voter fraud in the Washington gubernatorial election in which Christine Gregoire won by a margin of 129 votes.¹⁹ Certainly the potential of voter fraud is a matter of concern.

Broadly defined, voter fraud is “the intentional corruption of the electoral process by voters.”²⁰ While voter fraud manifests itself in different forms, examples include individuals who vote but are ineligible (such as non-citizens and felons), individuals who vote multiple times in various precincts, and individuals who vote using someone else’s name. Because of the lack of research and the difficulty of collecting data on voter fraud, the extent to which these kinds of voter fraud occur is unknown. Additionally, for similar reasons, we are unaware of the extent to which voter identification laws would curb the type of voter fraud they are intended to prevent.

However, there are some examples of recorded voter fraud. The Department of Justice asserts that since the inception of the Attorney General’s Ballot Access and Voting Integrity Initiative in 2002, 120 people have been charged with election fraud, of which 86 have been convicted.²¹ Additionally, the *Milwaukee Journal Sentinel* reports that prosecutors in Milwaukee filed charges against 14 individuals for voter fraud in the 2004 election.²² Of the 14, 10 were felons accused of voting and four were accused of double voting. Prosecutors obtained five convictions. For proponents of strict voter identification requirements, the knowledge that any voter fraud occurs is sufficient to argue that more needs to be done to curb this problem.²³

The most prevalent critique of the voter fraud argument is that “voter-fraud anecdotes are often misleading, incomplete, and unrepresentative.”²⁴ Proponents of this view contend that upon closer examination of claims of voter fraud, such charges turn out to be either nonexistent or infrequent. For instance, the Brennan Center for Justice at the New York University School of Law found that in 2004, voter fraud occurred 0.0009 percent of the time in the gubernatorial election in Washington and 0.00004 percent of the time in Ohio. They report that these percentages are akin to the likelihood of an American’s being killed by lightning.²⁵

Opponents of voter identification requirements also argue that the few instances of voter fraud that may be prevented by identification laws do not outweigh the thousands of legitimate voters who would be disenfranchised because they lacked the necessary

¹⁹ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, p. 4.

²⁰ Lorraine Minnite, “The Politics of Voter Fraud,” Project Vote, p. 6, at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf (July 24, 2007).

²¹ U.S. Department of Justice, “Fact Sheet: Protecting Voting Rights and Prosecuting Voter Fraud,” press release, October 31, 2006, at www.usdoj.gov/opa/pr/2006/November/06_crt_738.html (July 23, 2007).

²² Bill Glauber, “Her first vote put her in prison; Woman is one of five from city convicted of voter fraud,” *Milwaukee Journal Sentinel*, May 21, 2007, p. A1.

²³ Overton, “Voter Identification,” p. 648.

²⁴ *Ibid.*, p. 644.

²⁵ Brennan Center for Justice at NYU School of Law, “The Truth About ‘Voter Fraud,’” September 2006, p. 1, at www.brennancenter.org/dynamic/subpages/download_file_38347.pdf (July 24, 2007).

identification.²⁶ These critics argue that identification laws will have a negative impact on the ability of certain minorities, the elderly, the disabled, and the poor to vote.²⁷ It is presumed, and some studies have found, that people from these groups are less likely to possess drivers' licenses or other government-issued identification.²⁸ It is also assumed that many from these groups would be unable or unwilling acquire the necessary documentation. Critics of strict identification laws further argue that the costs (in both time and money) of obtaining such documentation would be a deterrent to voting and would likely result in lower voter turnout among poor voters and those who do not have easy access to government offices.²⁹ It is for this reason that "ID requirements are compared to modern poll taxes."³⁰

Looking at the empirical research that exists, a Wisconsin study found that when considering the entire state, 80 percent of men and 81 percent of women had valid drivers' licenses. In contrast, only 45 percent of African-American men and 51 percent of African-American women had valid drivers' licenses. The percentages for Latinos were also lower (54 percent for men and 41 percent for women).³¹ Similarly, a Georgia study found that among registered voters, non-whites, women, and the elderly were less likely to have government-issued photo identification (either a driver's license or state identification).³²

In contrast, proponents of voter identification requirements contend that requiring identification at the polls would not be an excessive burden to voters. As previously mentioned, identification is required for many things that are considerably less important than voting (flying in a plane, buying alcohol, etc.). As "voting is equally important," if not more important, the argument goes that it makes sense for someone to be required to show identification in order to cast a ballot.³³ Additionally, Senior Research Scientist John Lott at the University of Maryland Foundation points out that as "almost 100 countries require photo identifications to vote," the United States would be hardly alone in requiring voters to show some form of identification at the polls.³⁴

²⁶ Brennan Center for Justice at NYU School of Law and Spencer Overton, "Response to the Report of the 2005 Commission on Federal Election Reform," September 19, 2005, p. 2, at www.carterbakerdissent.com/final_carterbaker_rebuttal092005.pdf (July 24, 2007).

²⁷ *Ibid.*, p. 3.

²⁸ See John Pawasarat, "The Driver License Status of the Voting Age Population in Wisconsin," June 2005, at www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (July 24, 2007); Hood and Bullock, "Worth a Thousand Words?"; and Brennan Center for Justice at NYU School of Law, "Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification," November 2006, at www.federalectionreform.com/pdf/Citizens%20Without%20Proof.pdf (July 25, 2007).

²⁹ Task Force on the Federal Election System, John Mark Hansen, "Chapter 6: Verification of Identity," July 2001, p. 4, at www.tcf.org/Publications/ElectionReform/NCFER/hansen_chap6_verification.pdf (July 24, 2007).

³⁰ Timothy Ryan, "Voter ID Laws Need Measured Implementation," AEI-Brookings *Election Reform Project Newsletter*, April 17, 2007, at www.reformelections.org/commentary.asp?opedid=1555 (July 24, 2007).

³¹ Pawasarat, "The Driver License Status of the Voting Age Population in Wisconsin," p. 3.

³² Hood and Bullock, "Worth a Thousand Words?" p. 14.

³³ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, p. 18.

³⁴ Lott, "Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates," p. 2.

Those who oppose voter identification at the polls argue that other reforms are better suited to preventing voter fraud. For instance, critics of voter identification point to absentee ballots as “the Achilles heel of election security” because voters are often not required to show identification at all.³⁵ Yet absentee ballots have been largely left out of the voter identification requirement debate. This apparent discrepancy has been used by opponents of voter identification laws as evidence that supporters of such legislation are not interested in real voter fraud reform.³⁶ Rather, critics argue that voter identification supporters are using such laws as an attempt to suppress voter turnout by increasing the costs of voting (the “C” from the Calculus of Voting model).³⁷

Another argument proffered by supporters of voter identification requirements is that such laws are necessary to maintain the public’s faith in the integrity of elections. The Commission on Federal Election Reform (Carter–Baker Commission) at American University asserts that “the electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”³⁸ This argument, “the ensuring integrity hypothesis,” contends that public faith in the honesty of elections actually “encourages additional voter participation.”³⁹ Proponents argue that voter identification laws will bolster the public’s faith in the outcome of elections. This will increase, not decrease, turnout because voters will feel a greater pride in voting (increasing the “D” or duty component of voting).

Voter identification laws are exceptionally popular among the general public. In a survey of some 36,000 voters, Professors Stephen Ansolabehere and Elting R. Morison of the Massachusetts Institute of Technology found that 77 percent of respondents supported voter identification requirements.⁴⁰ For the most part, the majority of respondents supported such laws regardless of race, location (Northeast, Midwest, etc.), and political ideology. While those who identified themselves as conservatives had the highest percentage of agreement with identification requirements (at 95 percent), even those who identified themselves as “very liberal” had 50 percent agreement with voter identification laws.⁴¹ Regarding race, more than 70 percent of whites, African-Americans, and Hispanics supported voter identification laws.⁴² Additionally, Ansolabehere found only 23 instances out of 36,000 where an individual reported being unable to vote because he lacked the necessary identification.⁴³

³⁵ Ryan, “Voter ID Laws Need Measured Implementation.”

³⁶ Editorial, “Voter Suppression in Missouri,” *The New York Times*, August 10, 2006, p. 22, and Lott, “Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates,” p. 6.

³⁷ Editorial, “Voter Suppression in Missouri.”

³⁸ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, p. 18.

³⁹ Lott, “Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates,” p. 4.

⁴⁰ Stephen Ansolabehere and Elting R. Morison, “Access Versus Integrity in Voter Identification Requirements,” Department of Political Science, Massachusetts Institute of Technology, February 2007, at http://web.mit.edu/polisci/portl/cces/material/NYU_Identification1.pdf (July 24, 2007).

⁴¹ *Ibid.*, p. 4.

⁴² *Ibid.*, p. 5.

⁴³ *Ibid.*, p. 7.

These survey data are supported by actual voter behavior. In 2004, when Arizonans voted on Proposition 200, which would require voter identification at the polls as evidence of citizenship, it passed with 56 percent of the vote.⁴⁴

Ultimately, it is not the intent of this paper to debate the merits of either side's arguments. Rather, we want to present the major arguments on either side of this issue as background to our analysis. However, the paper does intend to examine more closely one of the claims of this debate: that stricter voter identification requirements depress voter turnout. In order to do that, it is necessary to discuss the different voter identification requirements across the 50 states and the District of Columbia.

Voter identification requirements, if any, differ by state, so there is great variability in the way voters from different parts of the country are required to verify their identity before casting a ballot. Some states rely on the honor system where voters merely have to give their names to the election official.⁴⁵ Other states only require a signature,⁴⁶ with some states going a step further and actually matching the signature to a previously signed document.⁴⁷ States with more stringent requirements ask that voters provide identification⁴⁸ or photo identification.⁴⁹

The Eagleton Institute study identified two categories of identification requirements (maximum requested and minimum required) and five types of identification requirements (stating name, signing name, signature match, present ID, and photo ID).⁵⁰ It is important to note that in 2004, there were no states that had photo ID as a minimum requirement. All states that had a photo ID requirement permitted voters who did not have such documentation to present alternative forms of ID or sign an affidavit attesting to their identity.⁵¹

By the maximum requested, the Eagleton Institute study refers to the most identification that an individual can be asked to present in order to vote using a regular ballot. Conversely, the minimum is the least identification that will be accepted to vote.⁵² For example, when voting in Louisiana in 2004, a voter would be asked by poll workers to present photo identification. If the individual was unable to present an acceptable form of ID, he was allowed to vote after signing an affidavit stating he is the person he claims to

⁴⁴ Election returns obtained from Arizona Secretary of State's Web site at www.azsos.gov/election/2004/General/Canvass2004General.pdf.

⁴⁵ As of 2004, such states included Maine, New Hampshire, and Rhode Island, among others.

⁴⁶ For instance, California, the District of Columbia, and Michigan were all "sign name" states in 2004.

⁴⁷ Nevada, Oregon, and Pennsylvania were all "signature match" states in 2004.

⁴⁸ Alabama, Alaska, and Connecticut are just a few of the states that required voters to show some form of identification at the polls in 2004.

⁴⁹ Florida, Hawaii, Louisiana, South Carolina, and South Dakota were all of the states requiring photo ID during the 2004 election.

⁵⁰ *Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002*, p. 8.

⁵¹ *Ibid.*, p. 9.

⁵² *Ibid.*

be.⁵³ In that case, photo ID would be the maximum requested, and affidavit would be the minimum required.

Within the states that require some form of documentation as proof of identity, there are also significant differences. For instance, some states, like Massachusetts, “may” ask that a voter show identification, but identification is not automatically requested of all voters.⁵⁴ In Alabama and Alaska, two states that request identification, this requirement can be waived if a poll worker knows the voter and can attest to his identity.⁵⁵ This is an important issue to consider because it means that different voters within the same state may be affected by different identification requirements.

Furthermore, by the 2004 election, many states had become compliant with certain provisions in the Help America Vote Act (HAVA) which required identification at the polls from first-time voters who registered by mail and who did not show identification at the time of registration. One state, Pennsylvania, actually went above and beyond HAVA requirements and mandated that all first-time voters needed to show identification at the polls regardless of whether they showed identification when they registered to vote.⁵⁶ Because of HAVA, many first-time voters had to show identification at the polls even in states that did not otherwise require identification from all voters.

Even among states that require documentation, there is great variability in the types of documentation that is accepted. Some accept only a government-issued photo identification, while others accept almost any document that demonstrates a person’s identity. For example, in 2004, acceptable documentation in Florida ranged from a driver’s license and passport to credit card and buyer’s club card to utility bill, bank statement, or paycheck (as long as they contained the name and address of the individual).⁵⁷ In contrast, some states that required identification to vote are much more restrictive with respect to acceptable forms of identification. One such state, Virginia, only allowed voters to present a voter registration card, Social Security card, employer-issued identification card (as long as it contained a photo), Virginia driver’s license, or other Commonwealth or government-issued identification.⁵⁸ Furthermore, in many states, individuals who are unable to provide the appropriate documentation are given an alternative, such as signing an affidavit, in order to vote. Finally, Section 302 of HAVA requires that an individual who fails to meet the identification requirements of voting can still vote using a provisional ballot.⁵⁹

The key aspects of this brief overview of identification requirements of voting is that there is a lot of variability by states as to what is required, and not all identification requirements are created equal. By that we mean that required identification documentation for one state may not meet the identity requirements in another state. This

⁵³ La. R.S. 18:562.

⁵⁴ 950 C.M.R. § 53.03(5B); 950 C.M.R. § 54.04(6B).

⁵⁵ Ala. Code § 17-9-30; Alaska Statute § 15.15.225.

⁵⁶ Pa. Stat. Ann. Tit. 25 § 3050.

⁵⁷ West’s Fla. Stat. Ann § 101.043.

⁵⁸ Va. Code Ann. § 24.2-643.

⁵⁹ Public Law 107-252.

is just one of the reasons that it is particularly difficult to study the effect of such laws on voter turnout.

THE DATA

In order to analyze individual voter turnout, this study uses data from the U.S. Census Bureau's Current Population Survey, November 2004: Voting and Registration Supplement File.⁶⁰ The November 2004 CPS voting supplement contains interviews from about 57,000 households. Based on self-described registered voters, the data allow us to model the decision to vote based on individual and household characteristics.

Dependent Variable. The dependent variable is whether or not the respondent reported that he or she voted in the November 2004 election. Respondents who admitted to not being registered voters were omitted, along with those reporting that they were not United States citizens. We also omitted those reported to be voting through absentee ballots.⁶¹

According to the U.S. Census Bureau's analysis of the November 2004 CPS data, 89 percent of registered voters voted in the November 2004 election.⁶² This estimate is drawn from a sample of respondents reporting to be registered voters and is much higher than estimates based on samples of the voting-age population. However, the EAC estimates that 70.4 percent of registered voters turned out to vote.⁶³ The CPS estimate of 89 percent may be biased upward because it is based on the reported vote, which may be overstated because survey respondents may be disinclined to admit that they did not vote.⁶⁴ When turnout is based on the total population over 18 years old, 55.8 percent of persons over age 18 voted.⁶⁵

Voter Identification Requirements. The voter identification requirements included in the analysis capture the degree to which a registered voter has to prove his or her identity at the polling station. Two sets of five dichotomous voter identification variables are used in the analysis. The first set is based on the maximum amount of identification that the voter is required to produce in order to prove his or her identity. The maximum state voter identification requirements are broken down into the following classification: state name, sign name, match signature, provide non-photo identification, and provide photo identification. Table 1 presents the voter identification classifications by state used by the

⁶⁰ Current Population Survey, November 2004: Voting and Registration Supplement.

⁶¹ To account for Oregon's elections that are conducted entirely through mail, Oregon voters are treated in this analysis as if they vote in person in the polling booth. Oregon is classified as a signature match state for voter identification purposes.

⁶² U.S. Census Bureau, "U.S. Voter Turnout Up in 2004, Census Bureau Reports," press release, May 26, 2004, at www.census.gov/Press-Release/www/releases/archives/voting/004986.html (July 2, 2007).

⁶³ Kimball W. Brace and Michael P. McDonald, *Final Report of the 2004 Election Day Survey*, U.S. Election Assistance Commission, September 27, 2005, at www.eac.gov/election_survey_2004/pdf/EDS-Full_Report_wTables.pdf (July 5, 2007).

⁶⁴ William H. Flanigan and Nancy H. Zingale, *Political Behavior of the American Electorate*, 11th edition (Washington, D.C.: CQ Press, 2006).

⁶⁵ Brace and McDonald, *Final Report of the 2004 Election Day Survey*.

Eagleton Institute and the Moritz College of Law at Ohio State University.

For all but two of the states, Illinois and Arizona, we used the classifications that were provided to us by the Eagleton Institute. We recoded these two states because upon researching state election laws, we discovered that the Eagleton Institute had erroneously reported the identification requirements for these two states. The Eagleton Institute study has Illinois listed as a “state name” state. In actuality, Illinois poll workers match a prospective voter’s signature to a signature already on file, making Illinois a “match signature” state.⁶⁶

The Eagleton Institute has Arizona listed as a “provide ID” state although Arizona was a “sign name” state at the time of the 2004 election.⁶⁷ Identification laws did not go into effect in Arizona until some time after the 2004 election. Arizona could not have been a “provide ID” state before the November 2004 election because Arizonans voted on and approved Proposition 200 on the November 2004 ballot. This initiative is the impetus for the requirement that voters show identification before voting as proof of citizenship.⁶⁸

--Insert Table 1--

The second set of voter identification variables recognizes that some states allow voters without proper identification to vote after demonstrating their identity through other means. This minimum requirement set of variables includes state name, sign name, match signature, provide non-photo identification, and swear affidavit. For the probit regressions, the variable for voters stating their names for identification is omitted for reference purposes.

Individual Factors. The individual factors included in the analysis capture differences in the race and ethnicity, age, education, household income, marital status, gender, employment status, citizenship, residential mobility, and home ownership of the individual respondents. Controlling for such variables as education and age is important because research indicates that these variables are good predictors of voting turnout.⁶⁹ The analysis controls for the effect of the individual’s race and ethnicity through a set of mutually exclusive dichotomous variables for the following categories: non-Hispanic white, non-Hispanic African-American, Hispanic, non-Hispanic American Indians, non-Hispanic Asians (including Hawaiians/Pacific Islanders), and other races, including those reporting multiple races and ethnicities. The specification of these variables allows us to compare the voting patterns of minorities to those of whites.

⁶⁶ Documentation supporting the signature match requirement can be found at the following: ILCS 5/6-66; electionline.org, Election Reform Briefing, April, 2002, p. 12, at www.electionline.org/Portals/1/Publications/Voter%20Identification.pdf; *Punchcard Manual of Instructions for Illinois Election Judges*, 2005, at www.elections.il.gov/Downloads/ElectionInformation/PDF/03selfsec.pdf; and Election Law @ Moritz, 50 Questions for 5 States, Illinois, last updated 1/19/07, at moritzlaw.osu.edu/electionlaw/election06/50-5_Illinois.php#14.

⁶⁷ Arizona Secretary of State, 2004 Ballot Propositions, “Instructions to Voters and Election Officers,” September, 2004, at www.azsos.gov/election/2004/Info/PubPamphlet/Sun_Sounds/english/contents.htm.

⁶⁸ The text of Proposition 200 is available at www.pan2004.com/docs/initiative_petition.pdf.

⁶⁹ Flanigan and Zingale, *Political Behavior of the American Electorate*.

A set of dichotomous variables control for the age of the individual respondents that fall into the following categories: 18- to 24-year-olds, 25- to 44-year-olds, 45- to 64-year-olds, and 65 years and older. For education, the respondents were classified as either having less than a high school diploma, high school diploma or equivalent, some college, bachelor's degree, or a graduate school degree.

For family income, the Eagleton Institute study used an ordinal family income variable as an interval-ratio variable.⁷⁰ The family income variable is coded as 1 through 16 with units containing unequal income ranges. For the purposes of this analysis, the effect of family income is controlled for by the inclusion of a series of income range dichotomous variables: under \$15,000, \$15,000 to \$29,999, \$30,000 to \$49,999, \$50,000 to \$74,999, \$75,000 to \$149,999, and \$150,000 or more.

To control for the influence of marital status, five dichotomous variables signifying being single, married, separated, divorced, and widowed are included in the model. Single individuals are the default. A dichotomous variable identifying the gender of the individual as a female is also included in the models.

Two dichotomous variables are included to control for the effect of employment. The first is a dichotomous variable signifying whether or not the individual is employed; the second is a dichotomous variable for whether or not the person is in the labor force.

To control for whether native-born citizens are more likely to vote than naturalized citizens, a dichotomous variable identifying native-born citizens is included. Two dichotomous variables are included to control for community ties. The models control for whether or not the individual has moved within the last year and whether or not the individual owns or rents his or her home. These two variables are included to help control for social connectedness under the theory that those with stronger community ties will be more likely to vote.

State Political Factors. As with the Eagleton Institute study, two dichotomous variables indicate whether a state is considered a battleground state and a competitive state. A state is designated as a battleground state if the margin of victory for the winning 2004 presidential candidate was 5 percent or less. A state was designated as competitive if the margin of victory for governor and/or U.S. Senate races was 5 percent or less.

FINDINGS

The probit regression analyses that follow examine the effects of voter identification requirements on voter turnout. Table 2 presents the original findings of the Eagleton

⁷⁰ The variable "HUFAMINC" in the November 2005 CPS has the following coding: 1 for less than \$5,000; 2 for \$5,000 to \$7,499; 3 for \$7,500 to \$9,999; 4 for \$10,000 to \$12,499; 5 for \$12,500 to \$14,999; 6 for \$15,000 to \$19,999; 7 for \$20,000 to \$24,999; 8 for \$25,000 to \$29,999; 9 for \$30,000 to \$34,999; 10 for \$35,000 to \$39,999; 11 for \$40,000 to \$49,999; 12 for \$50,000 to \$59,999; 13 for \$60,000 to \$74,999; 14 for \$75,000 to \$99,999; 15 for \$100,000 to \$149,999; and 16 for \$150,000 or more.

Institute's probit regression analysis. Table 3 presents the descriptive statistics of the data used in Table 4. Based on our analyses, six sets of probit regression models are presented in Tables 4 to 9.

The first set of probit regressions contains our replication of the Eagleton Institute study for their analysis of all voters (Table 4). The second set of probit regressions presents the findings for all voters under a different model specification and the corrected classification of state identification requirements for Arizona and Illinois (Table 5). The sixth through ninth sets of probit regressions present our findings for the different model specification and corrected coding for state identification requirements for whites, African-Americans, Hispanics, and Asians (Tables 6 through 9).

For all of the models, robust standard errors are estimated to correct for correlated error terms within each state. For tests of statistical significance, the standard two-tailed tests are used. See Box 1 for a discussion of one-tailed versus two-tailed tests of statistical significance. The calculations in Tables 4 through 9 use the CPS weight, PWSSWGT, as recommended by the Bureau of the Census.

--Start Box 1--

One-Tailed Versus Two-Tailed Tests of Statistical Significance

When doing tests of statistical significance for hypotheses, social scientists generally use two-tailed tests. Two-tailed tests are used to check for a difference while ignoring in which direction the difference lies.

For example, a social scientist would use a two-tailed test to determine whether voters in photo identification and give name states have different probabilities of reporting having voted in the 2004 election, regardless of the direction of the relationship. By using a two-tailed test, the 5 percent probability is split between both ends of the bell-shaped curve. (See Figure A in Chart 1.) That is, 2.5 percent of the probability that the difference is due to chance is placed in the side that represents respondents in photo identification states being less likely to vote, while 2.5 percent is placed in the side that represents respondents in photo identification states being more likely to vote. If the probit coefficient for photo identification states falls within either of the 2.5 percent shaded regions, this finding is determined to be statistically significant. If the coefficient falls within the left (right) tail, photo identification requirements have a negative (positive) relationship with reported voter turnout. If the coefficient falls between the 2.5 percent shaded regions, photo identification requirements are said have no relationship with voter turnout.

When one-tailed tests are used, social scientists are hypothesizing that the relationship between photo identification requirements and reported voting has a specific direction: for example, voter identification requirements decrease (increase) reported voting. As determined by the social scientist, all of the 5 percent of chance is placed in one end of the bell-shaped curve. If the direction of the relationship is as hypothesized, placing the

entire 5 percent chance in one side makes it is *twice as easy* to achieve a statistically significant finding with a one-tailed test as with a two-tailed test. Figure B in Chart 1 is an example of a one-tailed test where the researcher believes a negative relationship exists. In the case of photo identification requirements and voter turnout, if the coefficient falls within the 5 percent shaded region of the left tail, photo identification requirements would then be said to have a negative relationship. If the coefficient does not fall within the 5 percent region, then photo identification requirements are said to have no relationship with voter turnout.

According to norms of the social sciences, researchers generally use two-tailed tests. When they deviate from this norm, social scientists generally provide a justification for why they have done so. Consumers of statistical research should be skeptical of findings based on one-tailed tests, especially when such findings do not hold up under two-tailed testing.

--Insert Chart 1--

--Close Box 1--

Replicating the Eagleton Institute's Findings for All Voters

Table 2 contains the findings from the Eagleton Institute's probit regression for all registered voters as presented in their paper. Table 3 presents the findings from our attempt to replicate the Eagleton Institute study findings for all voters. In our attempt at replicating the Eagleton Institute's study, we could not entirely match the same number of respondents. The Eagleton Institute's probit regression of all voters is based on 54,973 respondents.⁷¹ Our best attempt at replicating their analysis produced 54,829 respondents—144 fewer respondents. In addition, the results reported in Table 3 use the more commonly accepted two-tailed significance tests.

--Insert Table 2--

--Insert Table 3--

While the Eagleton Institute reported that states with sign name, non-photo identification, and photo identification requirements have lower voter turnout than states with only the state name requirement, only the photo identification coefficient in our attempt at replication (Model 1) is statistically significant at the 95 percent confidence level. Respondents from photo identification states are less likely to have reported voting compared to respondents in states that only required voters to say their names at the polling stations. The magnitude of the negative relationship between photo identification requirements and voter turnout is difficult to interpret with probit coefficients, so the elasticity was calculated. The elasticity figures used in this analysis represent the percentage change in the probability of reporting to vote given a one-unit change in a particular dichotomous independent variable. The survey respondents in photo

⁷¹ Vercellotti and Anderson, "Protecting the Franchise, or Restricting It?" Table 3, p. 23.

identification states are 0.002 percent less likely to report voting than respondents from states that only required voters to give their name for identification.

Model 2 corrects for the Eagleton Institute study's misclassification of the voter identification requirements in Arizona and Illinois. With the correction, all of the state voter identification variables are statistically insignificant—meaning that none of these requirements has a statistically measurable relationship with voting turnout.

Model 3 attempts to replicate the findings of the Eagleton Institute's examination of the effect of minimum requirements. As seen in Table 2, the Eagleton Institute found that the coefficients for sign name, non-photo identification, and swear affidavit states had statistically significant, negative relationships with voter turnout using one-tailed significant tests. However, our analysis presented in Model 3 using two-tailed statistical significance tests finds only the swear affidavit coefficient to be statistically significant at the 95 percent confidence level. The survey respondents in swear affidavit states are 0.002 percent less likely to report voting than respondents from states that only required voters to state their name for identification.

It should be noted that although we ran the minimum identification requirement model using the classifications assigned to the states by the Eagleton Institute study, there are some issues with the states considered to have an affidavit as the minimum requirement. These issues should be addressed in follow-up studies. First, the Eagleton Institute study identified only four states as having a minimum requirement of sign affidavit. They are Florida, Indiana, Louisiana, and North Dakota. All but one of these states, Indiana, require some form of identification as the maximum requested. This puts Indiana in the precarious position of requiring, at a maximum, that a voter sign his name before receiving a ballot; if he is unable to do so, he can sign an affidavit and vote. This does not make sense, because Indiana in 2004 did not require identification before voting (other than for those affected by HAVA requirements).

We believe this to be another classification error on the part of the Eagleton Institute. According to the "2004 Indiana Election Day Handbook," the procedure for signing an affidavit only applies to challenged voters who are then given a provisional ballot if they sign the affidavit.⁷² This voting method would not fall under the guidelines set forth by the Eagleton Institute because it applies to provisional, and not regular, ballots.⁷³ For these reasons, we believe Indiana should have a minimum identification requirement of sign name, the same as its maximum.

Additionally, there are five other states (Connecticut,⁷⁴ Delaware,⁷⁵ Georgia,⁷⁶ South Dakota,⁷⁷ and Virginia⁷⁸) that require some form of identification but make exceptions

⁷² Indiana Election Division, "2004 Indiana Election Day Handbook: A Guide for Precinct Election Boards and Poll Workers," December 2003, pp. 13–17.

⁷³ *Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002*, p. 8.

⁷⁴ Conn. Gen. Stat. Ann. § 9-261.

⁷⁵ 15 Del. Code. § 4937.

⁷⁶ Ga. Code. Ann. § 21-2-417.

and allow voters without the required documentation to sign an affidavit in order to vote. To be classified correctly, these states should also be considered to have a minimum requirement of sign affidavit as they too provide opt outs for voters unable to show appropriate forms of identification.

As for the socioeconomic variables in Models 1 through 3, African-Americans are more likely to have reported voting in the election than a grouping of non-Hispanic whites, American Indians, Hawaiians/Pacific Islanders, and others. In contrast, Asians are less likely to report voting. Respondents aged 45 and above are more likely to report voting than those 18 to 24 years old. Those with an education at or above a high school diploma are more likely to report voting than those without a high school degree. Family income has a positive relationship with the probability of reporting having voted. Married and female respondents are more likely to report voting than not married and male respondents, respectively. Respondents residing in battleground states are more likely to vote, while respondents who moved within the last six months are less likely to report voting.

Alternative Model Specifications

Concerns regarding some of the variables used in the Eagleton Institute study led us to estimate alternative specifications that use the November 2004 CPS data more appropriately.

First, the Eagleton Institute's race and ethnicity dichotomous variables compare African-Americans, Hispanics, and Asians to the default group of whites, American Indians, Alaskan Natives, Hawaiians/Pacific Islanders, and those reporting to be more than one race and/or ethnicity. For example, the Eagleton Institute found that African-Americans were more likely to report voting compared to whites, American Indians, Alaskan Natives, Hawaiians/Pacific Islanders, and those reporting to be more than one race and/or ethnicity.

The descriptive statistics of the data used for the alternative specifications are presented in Table 4. The analyses in Table 5 control for the effect of the individual's race and ethnicity through a set of mutually exclusive dichotomous variables for the following categories: non-Hispanic whites, non-Hispanic African-Americans, Hispanics, non-Hispanic American Indians and Alaskan Natives, non-Hispanic Asians (including Hawaiians/Pacific Islanders), and other races, including those reporting multiple races and ethnicities. For example, this division of race and ethnic groups allows us to present clearer estimates of how voter identification laws affect the voting probabilities of minorities compared to whites.

--Insert Table 4--

--Insert Table 5--

⁷⁷ S.D. Codified Laws § 12-18-6.2.

⁷⁸ Va. Code. Ann. § 24.2-643.

Second, the Eagleton Institute study used an ordinal family income variable as an interval-ratio variable. Using categorical variables as ordinal variables can lead to estimation problems, so for the purposes of this analysis, the effect of family income is controlled for by the inclusion of a series of income range dichotomous variables.

Third, the effect of photo identification variables on voter turnout is very sensitive to how the models control for marriage. In addition to a dichotomous variable for whether or not the respondent reported being married, additional dichotomous variables were added for those reporting to be widowed, separated, and divorced. This minor change in marital control variables has a significant impact on the results for the relationship between voter turnout and some of the voter identification variables.

Fourth, the alternative models control for whether or not the individual has moved within the last year instead of the six-month time period used by the Eagleton Institute.

Fifth, a variable indicating whether or not the respondent owns or rents his or her home was added to the alternative models. These variables help to control for how connected the respondents are to their communities.

Table 5 presents the findings of the alternative model specification for all respondents. Model 4 contains the revised race/ethnicity and income variables along with the variables for residential mobility and home ownership. Of the four voter identification variables, only the photo identification variable is statistically significant. Photo identification states have respondents that are less likely to have reported voting compared to respondents in states that only required voters to say their names at the polling stations. However, the difference is very small. The survey respondents in photo identification states are 0.002 percent less likely to report voting than respondents from states that only required voters to state their name for identification.

A slight change in how marital status is controlled for in Model 5 makes the findings in Model 4 for photo identification requirements disappear. The inclusion of dichotomous variables to identify respondents if they are widowed, divorced, or separated, in addition to being married, significantly changes the results for the photo identification variable. A photo identification requirement no longer has a statistically significant relationship with voter turnout. Thus, the finding that photo identification requirements reduce voter turnout in Model 4 is not robust to an alternative model specification.

In Models 6 and 7, Arizona and Illinois are reclassified correctly as requiring voters at polling stations to sign their name and match signatures, respectively. As with Model 4, Model 6 uses only a married dichotomous variable to control for marital status. Model 7 includes additional marital status variables as used in Model 5. After correctly designating Arizona and Illinois, the different ways to control for marital status have no effect on the outcomes for the voter identification variables. All of the state voter identification variables are statistically insignificant—meaning that none of these requirements has a statistically measurable relationship with voter turnout.

Model 8 uses the minimum requirements for voter identification as used by the Eagleton Institute. The only voter identification coefficient to be statistically significant is the swear affidavit coefficient. The survey respondents in swear affidavit states are 0.002 percent less likely to report voting than respondents from states that only require voters to state their name for identification.

As for the socioeconomic variables in Models 4 through 8, the findings are similar to the previous findings. African-Americans are more likely to have reported voting in the election than non-Hispanic whites, while Asians are less likely to report voting. Older respondents and those with higher incomes and more education are more likely to report voting. Widowed, divorced, and separated respondents are less likely to report voting than singles, while married respondents are more likely to report voting. Female respondents are more likely to report voting than male respondents. Respondents residing in battleground states are more likely to vote, while respondents who moved within the last six months are less likely to have reported voting.

Findings by Race and Ethnicity

The impact of voter identification requirements on minority voters has received much media attention recently.⁷⁹ To analyze the relationship between race and ethnicity and voter identification requirements, Tables 6 through 9 present the findings of the probit analyses.

Non-Hispanic Whites. The probit regression results presented in Table 6 contain data for respondents reporting to be non-Hispanic whites. Models 9 and 10 present the findings for the maximum requirements with Model 10 including the correct voter identification classifications for Arizona and Illinois. Except for the photo identification coefficient, none of the coefficients for the voter identification variables are statistically different from zero. In both Models 9 and 10, white respondents in photo identification states are less likely to have reported voting compared to white respondents in states that only required voters to say their names at the polling stations. Under both models, white survey respondents in photo identification states are 0.002 percent less likely to report voting than white respondents from states that only required voters to state their name.

--Insert Table 6--

The analysis of minimum voter identification requirements in Model 11 finds that white respondents are less likely to vote when the minimum requirement entails a sworn affidavit. White survey respondents in swear affidavit states are 0.002 percent less likely to report voting than white respondents from states that only required voters to give their name.

⁷⁹ Tom Baxter and Jim Galloway, "Wonk Alert: Study Says the Heavier the Voter ID Requirements, the Lower Turnout"; Wolf, "Study: Stricter Voting ID Rules Hurt '04 Turnout"; and Dave Zweifel, "Voter ID Reducing Minority Turnout," *The Capital Times* (Madison, Wisconsin), February 28, 2007, p. A6.

Non-Hispanic African-Americans. The probit regression results presented in Table 7 contain data for respondents reporting to be non-Hispanic African-Americans. Models 12 and 13 present the findings for the maximum requirements with Model 13 including the correct voter identification classifications for Arizona and Illinois. Except for the non-photo identification coefficient, none of the coefficients for the voter identification variables are statistically different from zero. In both Models 12 and 13, African-American respondents in non-photo identification states are less likely to have reported voting compared to African-American respondents in states that only required voters to say their names at the polling stations. In Model 12, African-American respondents in non-photo identification states are 0.019 percent less likely to report voting than African-American respondents from states that only required voters to state their name. For Model 13, the elasticity for non-photo identification states is 0.012 percent.

--Insert Table 7--

The analysis of minimum voter identification requirements in Model 14 fails to find any statistically significant relationships between African-American voter turnout and the minimum voting requirements.

Hispanics. The probit regression results presented in Table 8 contain data for respondents reporting to be Hispanic. Models 15 and 16 present the findings for the maximum requirements with Model 16 including the correct voter identification classifications for Arizona and Illinois. Model 17 presents the findings for the minimum voter identification requirements. All three models find that Hispanics reported lower voter turnout rates in states with non-photo identification requirements compared to states that only require voters to state their names at the polling stations. All three of these findings are statistically significant at the 95 percent confidence level. Hispanic respondents in non-photo identification states are 0.035 percent to 0.049 percent less likely to report voting than Hispanic respondents from states that only required voters to state their name.

--Insert Table 8--

Asian Americans. The probit regression results presented in Table 9 contain data for respondents reporting to be non-Hispanic Asian American (including Hawaiians/Pacific Islanders). Models 18 and 19 present the findings for the maximum requirements with Model 19 including the correct voter identification classifications for Arizona and Illinois. Model 20 presents the findings for the minimum voter identification requirements. All three models find that the various state voter identification requirements do not have a statistically measurable relationship with voter turnout of Asian Americans.

--Insert Table 9--

DISCUSSION

The findings of this analysis suggest that voter identification requirements, such as requiring non-photo and photo identification, have virtually no suppressive effect on reported voter turnout.

Caution is needed in interpreting the Eagleton Institute's findings, for at least three reasons.

First, their study used one-tailed significance tests that can be used to double the chances of finding statistically significant findings.

Second, the voter identification laws for two states, Arizona and Illinois, were incorrectly classified. From our modeling, this misclassification leads to a negative and statistically significant relationship between photo identification requirements and voter turnout for all registered voters. When Arizona and Illinois are correctly classified, the relationship in our modeling is statistically indistinguishable from zero.

Third, the findings for photo identification requirements are sensitive to model specification. Using the Eagleton Institute's state voter identification classifications and controlling for marriage with a married or not dichotomous variable, our analysis of overall voter turnout finds that photo identification requirements have a negative and statistically significant relationship with overall voter turnout. However, when additional marital status variables—widowed, divorced, separated—are included, the statistically significant relationship for photo identification requirements disappears.

Controlling for factors that influence voter turnout, states with stricter voter identification laws largely do not have the claimed negative impact on voter turnout when compared to states with more lenient voter identification laws. Based on the Eagleton Institute's findings, some members of the media have claimed that voter identification law suppress voter turnout, especially among minorities.⁸⁰ Their conclusion is unfounded. When statistically significant and negative relationships are found in our analysis, the effects are so small that the findings offer little policy significance.

More important, minority respondents in states that required photo identification are just as likely to report voting as are minority respondents from states that only required voters to say their name.

Nevertheless, using data from the November 2004 CPS to study the impact of voter identification requirements on voter turnout does have its limitations. The November 2004 CPS is a cross-sectional data set that does not allow social scientists to estimate the effect of changing voter identification requirements within states over time. Studies using the November CPS can only provide information on how voter patterns differed between

⁸⁰ Baxter and Galloway, "Wonk Alert: Study Says the Heavier the Voter ID Requirements, the Lower Turnout"; Wolf, "Study: Stricter Voting ID Rules Hurt '04 Turnout"; and Zweifel, "Voter ID Reducing Minority Turnout."

states with different voter identification requirements. These studies cannot provide information on how enacting stiffer voter identification requirements will affect voter turnout within states over time. To do so, panel data sets that consist of cross-sectional and time-series data are necessary. Panel studies observe multiple units (e.g., individual voters, voting precincts, and counties) over several time periods.

To the best of our knowledge, there is only one voter identification study that utilizes the benefits of panel data. The study, by John R. Lott of the University of Maryland Foundation, analyzed the effect of stricter voter identification requirements on U.S. primary and general elections from 1996 to 2006.⁸¹ Dr. Lott found little support for the notion that non-photo and photo identification requirements suppress voter turnout.

As states adopt stricter voter identification requirements to deter voter fraud, future research needs to adopt panel data methods to determine how the laws affect voter turnout.

CONCLUSION

Controlling for factors that influence voter turnout, voter identification laws largely do not have the claimed negative impact on voter turnout based on state-to-state comparisons. When statistically significant and negative relationships are found, the effects are so small that the findings offer little policy significance. White survey respondents in photo identification states are 0.002 percent less likely to report voting than white respondents from states that only required voters to state their name. African-American respondents in non-photo identification states are 0.012 percent less likely to report voting than African-American respondents from states that only required voters to state their name.

In other cases, no effect was found. In general, respondents in photo identification and non-photo identification states are *just as likely* to report voting compared to respondents from states that only required voters to state their name. African-American respondents in photo identification states are *just as likely* to report voting compared to African-American respondents from states that only required voters to state their name. Hispanic respondents in photo identification states are *just as likely* to report voting compared to Hispanic respondents from states that only required voters to state their name.

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⁸¹ Lott, "Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates."

State	Eagleton Institute Maximum Requirement	Corrected Maximum Requirement	Eagleton Institute Minimum Requirement
Alabama	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Alaska	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Arizona	Provide non-photo ID	Sign name	Provide non-photo ID
Arkansas	Provide non-photo ID	Provide non-photo ID	State name
California	Sign name	Sign name	Sign name
Colorado	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Connecticut	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Delaware	Provide non-photo ID	Provide non-photo ID	State name
District of Columbia	Sign name	Sign name	Sign name
Florida	Provide photo ID	Provide photo ID	Swear affidavit
Georgia	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Hawaii	Provide photo ID	Provide photo ID	Provide non-photo ID
Idaho	Sign name	Sign name	Sign name
Illinois	State name	Match signature	State name
Indiana	Sign name	Sign name	Swear affidavit
Iowa	Sign name	Sign name	Sign name
Kansas	Sign name	Sign name	Sign name
Kentucky	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Louisiana	Provide photo ID	Provide photo ID	Swear affidavit
Maine	State name	State name	State name
Maryland	Sign name	Sign name	Sign name
Massachusetts	State name	State name	State name
Michigan	Sign name	Sign name	Sign name
Minnesota	Sign name	Sign name	Sign name
Mississippi	Sign name	Sign name	Sign name
Missouri	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Montana	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Nebraska	Sign name	Sign name	Sign name
Nevada	Match signature	Match signature	Match signature
New Hampshire	State name	State name	State name
New Jersey	Match signature	Match signature	Match signature
New Mexico	Sign name	Sign name	Sign name
New York	Match signature	Match signature	Sign name
North Carolina	State name	State name	State name
North Dakota	Provide non-photo ID	Provide non-photo ID	Swear affidavit
Ohio	Match signature	Match signature	Match signature
Oklahoma	Sign name	Sign name	Sign name
Oregon	Match signature	Match signature	Match signature
Pennsylvania	Match signature	Match signature	Match signature
Rhode Island	State name	State name	State name
South Carolina	Provide photo ID	Provide photo ID	Provide non-photo ID
South Dakota	Provide photo ID	Provide photo ID	Provide non-photo ID
Tennessee	Provide non-photo ID	Provide non-photo ID	Match signature
Texas	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Utah	State name	State name	State name
Vermont	State name	State name	State name
Virginia	Provide non-photo ID	Provide non-photo ID	Provide non-photo ID
Washington	Sign name	Sign name	Sign name
West Virginia	Match signature	Match signature	Sign name
Wisconsin	State name	State name	State name
Wyoming	State name	State name	State name

Sources: Eagleton Institute of Politics, Rutgers; State University of New Jersey; and Moritz College of Law, Ohio State University, Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act Of 2002, June 28, 2006, at www.eac.gov/docs/VoterIDReport%20062806.pdf (July 30, 2007), and author's personal communication with Timothy Vercellotti (June 1, 2001).

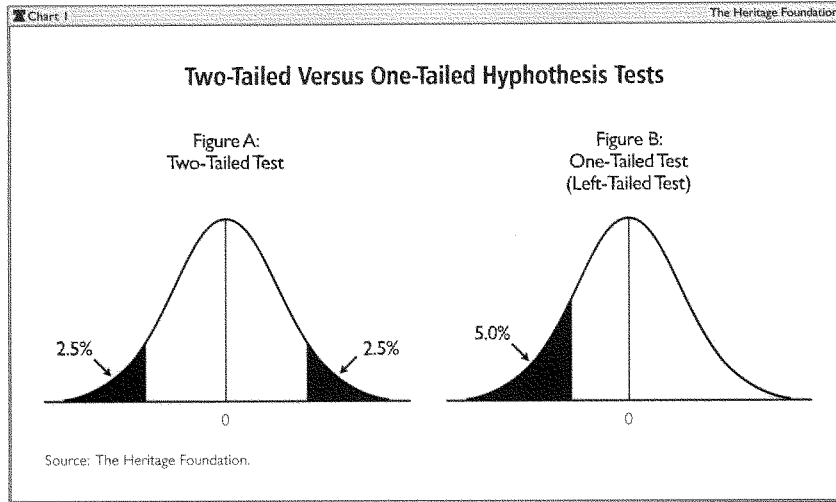


Table 2

The Heritage Foundation

Copies of Eagleton Institute's Probit Models of Voter Turnout

Variable	Maximum Requirement		Minimum Requirement	
	Coefficient	Robust S.E.	Coefficient	Robust S.E.
Sign name	-0.11*	0.05	-0.08*	0.04
Match signature	-0.04	0.05	-0.03	0.05
Non-photo ID	-0.16**	0.06	-0.15**	0.05
Photo ID	-0.17**	0.07	--	--
Affidavit	--	--	-0.23**	0.06
Hispanic	-0.08	0.05	-0.08	0.05
African-American	0.24**	0.04	0.24**	0.04
Asian American	-0.37**	0.07	-0.38**	0.07
Age 25-44	0.004	0.02	0.003	0.02
Age 45-64	0.26**	0.03	0.26**	0.03
Age 65+	0.43**	0.03	0.43**	0.03
High school	0.31**	0.02	0.31**	0.02
Some college	0.57**	0.03	0.57**	0.03
College	0.88**	0.04	0.88**	0.04
Graduate school	0.98**	0.05	0.98**	0.05
Household income	0.03**	0.003	0.03**	0.003
Married	0.23**	0.02	0.23**	0.02
Female	0.10**	0.01	0.10**	0.01
Battleground state	0.17**	0.04	0.18**	0.04
Competitive race	0.05	0.06	0.05	0.05
Employed	0.05	0.05	0.05	0.05
Member of workforce	-0.05	0.05	-0.05	0.05
Native-born citizen	0.02	0.04	0.02	0.04
Moved within past 6 months	-0.29**	0.03	-0.29**	0.03
Constant	-0.09	0.10	-0.09	0.09
Pseudo R-squared	0.09		0.10	
N	54,973		54,973	

* p < 0.05 ** p < 0.01 *** p < 0.001

Note: One-tailed significance tests were used.

Source: Timothy Vercellotti and David Anderson, "Protecting the Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout," American Political Science Association conference paper, Philadelphia, Pa., August 31-September 3, 2006, p. 23, Table 3.

Variable	Maximum Requirement				Minimum Requirement	
	Model 1		Model 2		Model 3	
	Replication		Recoded States		Replication	
	Coefficient	Robust S.E.	Coefficient	Robust S.E.	Coefficient	Robust S.E.
Sign name	-0.08	0.04	-0.06	0.06	-0.03	0.05
Match signature	-0.01	0.05	0.01	0.06	-0.02	0.07
Non-photo ID	-0.10	0.06	-0.10	0.07	-0.08	0.06
Photo ID	-0.10*	0.05	-0.10	0.06	--	--
Affidavit	--	--	--	--	-0.10*	0.05
Hispanic	-0.08	0.05	-0.08	0.05	-0.08	0.05
African-American	0.29***	0.04	0.29***	0.05	0.24**	0.05
Asian American	-0.45***	0.07	-0.45***	0.08	-0.46**	0.07
Age 25-44	-0.01	0.02	-0.01	0.03	-0.11	0.03
Age 45-64	0.27***	0.03	0.27***	0.03	0.27***	0.03
Age 65+	0.44***	0.03	0.44***	0.03	0.45***	0.03
High school	0.32***	0.03	0.32***	0.25	0.32***	0.03
Some college	0.61***	0.03	0.61***	0.03	0.61***	0.03
College	0.90***	0.04	0.90***	0.04	0.90***	0.04
Graduate school	1.04***	0.05	1.04***	0.05	1.05***	0.05
Household income	0.04***	0.003	0.04***	0.003	0.04***	0.003
Married	0.21***	0.03	0.21***	0.03	0.21***	0.03
Female	0.10***	0.02	0.10***	0.02	0.10***	0.02
Battleground state	0.20***	0.04	0.20***	0.04	0.21***	0.05
Competitive race	-0.03	0.06	-0.02	0.06	-0.02	0.06
Employed	0.03	0.05	0.03	0.05	0.03	0.05
Member of workforce	0.07	0.06	0.07	0.06	0.07	0.07
Native-born citizen	-0.02	0.05	-0.01	0.05	-0.02	0.05
Moved within past 6 months	-0.36***	0.04	-0.36***	0.04	-0.36***	0.04
Constant	-0.11	0.09	-0.12	0.10	-0.13	0.09
Pseudo R-squared	0.10		0.10		0.10	
N	54,829		54,829		54,829	

* p < 0.05 ** p < 0.01 *** p < 0.001

Note: Two-tailed significance tests were used. Robust standard errors adjusted for state clustering are reported. The CPS population weights were used.

Source: Heritage Foundation calculations.

Table 4

The Heritage Foundation

Descriptive Statistics

Variable	Mean	Standard Deviation	Minimum	Maximum
Voted	0.87	0.33	0	1
Sign name	0.26	0.44	0	1
Match signature	0.17	0.38	0	1
Non-photo ID	0.26	0.44	0	1
Photo ID	0.09	0.28	0	1
Recoded sign name	0.27	0.44	0	1
Recoded match signature	0.21	0.41	0	1
Recoded non-photo ID	0.25	0.43	0	1
Recoded photo ID	0.09	0.28	0	1
Hispanic	0.05	0.21	0	1
African-American	0.09	0.29	0	1
American Indian	0.01	0.09	0	1
Asian American	0.02	0.14	0	1
Other race	0.02	0.12	0	1
Age 25-44	0.37	0.48	0	1
Age 45-64	0.38	0.48	0	1
Age 65+	0.17	0.37	0	1
High school	0.30	0.46	0	1
Some college	0.31	0.46	0	1
College	0.20	0.40	0	1
Graduate school	0.10	0.31	0	1
Family income, \$15,000-\$29,999	0.15	0.36	0	1
Family income, \$30,000-\$49,999	0.22	0.42	0	1
Family income, \$50,000-\$74,999	0.22	0.42	0	1
Family income, \$75,000-\$149,999	0.24	0.42	0	1
Family income, \$150,000 or more	0.06	0.24	0	1
Married	0.63	0.48	0	1
Widowed	0.06	0.24	0	1
Divorced	0.10	0.30	0	1
Separated	0.02	0.13	0	1
Female	0.53	0.50	0	1
Battleground state	0.28	0.45	0	1
Competitive race	0.19	0.39	0	1
Employed	0.69	0.46	0	1
Member of workforce	0.72	0.45	0	1
Native-born citizen	0.96	0.20	0	1
Moved within last year	0.13	0.33	0	1
Home ownership	0.80	0.40	0	1
N = 54,695				

Source: Heritage Foundation calculations based on U.S. Census Bureau, Current Population Survey, November 2004: Voting and Registration Supplement, 2005.

Variable	Maximum Requirement								Minimum Requirement	
	Model 4		Model 5		Model 6		Model 7		Model 8	
	Vercellotti Categories		Vercellotti Categories		Recoded States		Recoded States		Vercellotti Categories	
	Coefficient	Robust S.E.	Coefficient	Robust S.E.	Coefficient	Robust S.E.	Coefficient	Robust S.E.	Coefficient	Robust S.E.
Sign name	-0.07	0.05	-0.07	0.05	-0.06	0.06	-0.06	0.06	-0.03	0.05
Match signature	-0.001	0.06	-0.00003	0.06	0.01	0.07	0.01	0.06	-0.01	0.07
Non-photo ID	-0.10	0.06	-0.10	0.06	-0.11	0.07	-0.11	0.07	-0.08	0.06
Photo ID	-0.10*	0.05	-0.10	0.05	-0.10	0.06	-0.095	0.06	--	--
Affidavit	--	--	--	--	--	--	--	--	-0.10*	0.05
Hispanic	-0.07	0.06	-0.07	0.06	-0.07	0.06	-0.07	0.06	-0.7	0.06
African-American	0.30***	0.05	0.29***	0.05	0.30***	0.05	0.29***	0.05	0.29***	0.05
American Indian	-0.10	0.08	-0.10	0.08	-0.11	0.08	-0.11	0.07	-0.11	0.08
Asian American	-0.43***	0.07	-0.44***	0.07	-0.44***	0.07	-0.44***	0.07	-0.45***	0.07
Other race	-0.02	0.06	-0.02	0.06	-0.02	0.06	-0.02	0.06	-0.03	0.06
Age 25-44	-0.01	0.03	0.05	0.03	-0.01	0.03	0.05	0.03	0.06	0.03
Age 45-64	0.25***	0.03	0.33***	0.04	0.25***	0.04	0.33***	0.04	0.33***	0.04
Age 65+	0.40***	0.03	0.53***	0.04	0.40***	0.03	0.53***	0.04	0.53***	0.04
High school	0.33***	0.03	0.32***	0.03	0.33***	0.03	0.32***	0.03	0.32***	0.03
Some college	0.62***	0.03	0.61***	0.03	0.62***	0.03	0.61***	0.03	0.61***	0.03
College	0.91***	0.04	0.90***	0.04	0.91***	0.04	0.90***	0.04	0.90***	0.04
Graduate school	1.05***	0.05	1.04***	0.05	1.05***	0.05	1.04***	0.05	1.04***	0.05
Family income, \$15,000-\$29,999	0.17***	0.02	0.16***	0.02	0.17***	0.02	0.16***	0.02	0.16***	0.02
Family income, \$30,000-\$49,999	0.21***	0.03	0.19***	0.03	0.21***	0.03	0.19***	0.03	0.20***	0.03
Family income, \$50,000-\$74,999	0.24***	0.03	0.23***	0.03	0.24***	0.03	0.23***	0.03	0.23***	0.03
Family income, \$75,000-\$149,999	0.39***	0.04	0.38***	0.04	0.39***	0.04	0.38***	0.04	0.39***	0.04
Family income, \$150,000 or more	0.37***	0.05	0.36***	0.05	0.37***	0.05	0.36***	0.05	0.36***	0.05
Married	0.20***	0.03	0.10***	0.04	0.20***	0.03	0.11***	0.04	0.10***	0.04
Widowed	--	--	-0.24***	0.04	--	--	-0.24***	0.04	-0.25***	0.04
Divorced	--	--	-0.10***	0.04	--	--	-0.10***	0.04	-0.11***	0.04
Separated	--	--	-0.24***	0.04	--	--	-0.24***	0.04	-0.24***	0.04
Female	0.10***	0.02	0.11***	0.02	0.10***	0.02	0.11***	0.02	0.11***	0.02
Battleground state	0.20***	0.04	0.19***	0.04	0.19***	0.04	0.19***	0.04	0.20***	0.05
Competitive race	-0.03	0.06	-0.03	0.06	-0.02	0.06	-0.02	0.06	-0.02	0.06
Employed	0.03	0.05	0.04	0.05	0.03	0.05	0.04	0.05	0.04	0.05
Member of workforce	0.08	0.06	0.07	0.06	0.08	0.06	0.07	0.06	0.06	0.06
Native-born citizen	-0.02	0.05	-0.02	0.05	-0.02	0.05	-0.02	0.05	-0.03	0.05
Moved within last year	-0.27***	0.03	-0.27***	0.03	-0.27***	0.03	-0.27***	0.03	-0.27***	0.03
Home ownership	0.16***	0.03	0.17***	0.03	0.16***	0.03	0.17***	0.03	0.17***	0.03
Constant	-0.08	0.09	-0.05	0.09	-0.11	0.09	-0.06	0.11	-0.07	0.09
Pseudo R-squared	0.10		0.10				0.11		0.10	
N	54,695		54,695		54,695		54,695		54,695	

* p < 0.05 ** p < 0.01 *** p < 0.001

Note: Two-tailed significance tests were used. Robust standard errors adjusted for state clustering are reported. The CPS population weights were used.

Source: Heritage Foundation calculations.

Variable	Maximum Requirement				Minimum Requirement	
	Model 9		Model 10		Model 11	
	Vercellotti Coefficient	Categorizations Robust S.E.	Recorded States Coefficient	Robust S.E.	Vercellotti Coefficient	Categorizations Robust S.E.
Sign name	-0.05	0.05	-0.06	0.07	-0.02	0.05
Match signature	0.01	0.06	-0.01	0.07	-0.01	0.08
Non-photo ID	-0.04	0.07	-0.06	0.08	-0.05	0.07
Photo ID	-0.12*	0.05	-0.14*	0.06	--	--
Affidavit	--	--	--	--	-0.13**	0.04
Age 25-44	0.05	0.04	0.05	0.04	0.05	0.04
Age 45-64	0.34***	0.04	0.34***	0.04	0.34***	0.04
Age 65+	0.54***	0.05	0.54***	0.05	0.54***	0.05
High school	0.38***	0.03	0.38***	0.03	0.38***	0.03
Some college	0.70***	0.03	0.70***	0.03	0.70***	0.03
College	1.00***	0.04	1.00***	0.04	1.00***	0.04
Graduate school	1.13***	0.05	1.13***	0.05	1.13***	0.05
Family income, \$15,000-\$29,999	0.16***	0.04	0.16***	0.04	0.16***	0.03
Family income, \$30,000-\$49,999	0.22***	0.03	0.22***	0.03	0.22***	0.03
Family income, \$50,000-\$74,999	0.24***	0.03	0.24***	0.04	0.24***	0.03
Family income, \$75,000-\$149,999	0.36***	0.05	0.36***	0.05	0.36***	0.05
Family income, \$150,000 or more	0.36***	0.05	0.36***	0.05	0.36***	0.05
Married	0.16**	0.04	0.17***	0.04	0.16**	0.04
Widowed	-0.20***	0.04	-0.20***	0.04	-0.20***	0.04
Divorced	-0.10**	0.04	-0.10**	0.04	-0.10**	0.04
Separated	-0.33***	0.07	-0.33***	0.07	-0.33***	0.07
Female	0.09***	0.01	0.09***	0.01	0.09***	0.03
Battleground state	0.19***	0.05	0.19***	0.05	0.19***	0.05
Competitive race	-0.04	0.06	-0.04	0.06	-0.04	0.06
Employed	0.08	0.08	0.08	0.06	0.08	0.06
Member of workforce	-0.001	0.06	-0.001	0.06	0.002	0.06
Native-born citizen	0.09	0.09	0.09	0.09	-0.09	0.09
Moved within last year	-0.25***	0.03	-0.25***	0.03	-0.25***	0.03
Home ownership	0.15***	0.03	0.15***	0.03	0.15***	0.03
Constant	-0.05	0.12	-0.05	0.13	-0.26*	0.12
Pseudo R-squared	0.11		0.11		0.11	
N	44,762		44,762		44,762	

* p < 0.05 ** p < 0.01 *** p < 0.001

Note: Two-tailed significance tests were used. Robust standard errors adjusted for state clustering are reported. The CPS population weights were used.

Source: Heritage Foundation calculations.

Variable	Maximum Requirement				Minimum Requirement	
	Model 12		Model 13		Model 14	
	Vercellotti Categories		Recoded States		Vercellotti Categories	
	Coefficient	Robust S.E.	Coefficient	Robust S.E.	Coefficient	Robust S.E.
Sign name	-0.20	0.12	-0.09	0.11	-0.03	0.14
Match signature	-0.13	0.10	-0.06	0.11	-0.03	0.15
Non-photo ID	-0.30***	0.09	-0.19*	0.08	-0.12	0.12
Photo ID	-0.15	0.15	-0.03	0.14	—	—
Affidavit	—	—	—	—	0.0002	0.21
Age 25–44	0.03	0.10	0.03	0.10	0.03	0.10
Age 45–64	0.13	0.11	0.13	0.11	0.13	0.11
Age 65+	0.35*	0.14	0.35*	0.14	0.36*	0.14
High school	0.30***	0.05	0.30***	0.05	0.30***	0.05
Some college	0.44***	0.08	0.44***	0.08	0.44***	0.08
College	0.70***	0.10	0.70***	0.10	0.69***	0.10
Graduate school	0.88***	0.13	0.89***	0.13	0.86***	0.13
Family income, \$15,000–\$29,999	0.21**	0.08	0.21**	0.08	0.21**	0.08
Family income, \$30,000–\$49,999	0.27**	0.08	0.27**	0.08	0.28**	0.08
Family income, \$50,000–\$74,999	0.39**	0.13	0.38**	0.13	0.39**	0.12
Family income, \$75,000–\$149,999	0.68***	0.14	0.67***	0.14	0.68***	0.14
Family income, \$150,000 or more	0.82*	0.32	0.82**	0.32	0.83*	0.32
Married	0.03	0.08	0.03	0.08	0.03	0.08
Widowed	-0.10***	0.11	-0.10***	0.11	-0.10***	0.11
Divorced	0.13	0.07	0.13	0.07	0.12	0.07
Separated	-0.11	0.09	-0.11	0.09	-0.09	0.10
Female	0.16	0.07	0.16	0.07	0.16	0.07
Battleground state	0.15	0.11	0.11	0.11	0.16	0.13
Competitive race	-0.01	0.11	0.04	0.11	0.02	0.10
Employed	-0.10	0.13	-0.11	0.13	-0.10	0.13
Member of workforce	0.37**	0.13	0.38**	0.13	0.37**	0.13
Native-born citizen	0.22	0.13	0.25	0.13	0.21	0.14
Moved within last year	-0.31***	0.07	-0.31***	0.07	-0.33***	0.07
Home ownership	0.20***	0.07	0.20***	0.07	0.19**	0.07
Constant	0.07	0.17	0.08	0.17	0.06	0.18
Pseudo R-squared	0.11		0.11		0.10	
N	4,958		4,958		4,958	

* p < 0.05 ** p < 0.01 *** p < 0.001

Note: Two-tailed significance tests were used. Robust standard errors adjusted for state clustering are reported. The CPS population weights were used.

Source: Heritage Foundation calculations.

Variable	Maximum Requirement				Minimum Requirement	
	Model 15		Model 16		Model 17	
	Vercellotti Categories		Recoded States		Vercellotti Categories	
	Coefficient	Robust S.E.	Coefficient	Robust S.E.	Coefficient	Robust S.E.
Sign name	-0.27	0.14	-0.11	0.18	-0.21	0.14
Match signature	-0.16	0.14	0.03	0.18	-0.16	0.14
Non-photo ID	-0.44**	0.15	-0.35*	0.18	-0.40*	0.15
Photo ID	-0.12	0.16	-0.02	0.18	--	--
Affidavit	--	--	--	--	-0.16	0.16
Age 25–44	0.08	0.08	0.09	0.08	0.08	0.08
Age 45–64	0.38***	0.07	0.39***	0.07	0.39***	0.07
Age 65+	0.40**	0.12	0.40***	0.12	0.41***	0.12
High school	0.11	0.07	0.10	0.07	0.11	0.07
Some college	0.44***	0.04	0.43***	0.04	0.44***	0.04
College	0.53***	0.10	0.52***	0.10	0.53***	0.10
Graduate school	0.78***	0.20	0.78***	0.20	0.78***	0.20
Family income, \$15,000–\$29,999	0.12	0.08	0.13	0.08	0.12	0.08
Family income, \$30,000–\$49,999	0.01	0.15	0.001	0.15	0.01	0.15
Family income, \$50,000–\$74,999	0.21**	0.08	0.20**	0.07	0.21**	0.08
Family income, \$75,000–\$149,999	0.40***	0.10	0.39***	0.09	0.40***	0.10
Family income, \$150,000 or more	0.09	0.16	0.08	0.16	0.09	0.16
Married	-0.12	0.08	-0.11	0.08	-0.12	0.08
Widowed	-0.40***	0.13	-0.40***	0.13	-0.41***	0.13
Divorced	-0.14	0.11	-0.13	0.11	-0.14	0.11
Separated	-0.001	0.10	-0.003	0.10	-0.01	0.10
Female	0.16***	0.04	0.16***	0.04	0.16***	0.04
Battleground state	0.41***	0.08	0.39***	0.08	0.42***	0.08
Competitive race	-0.29**	0.11	-0.23**	0.11	-0.25*	0.11
Employed	-0.17	0.09	-0.17	0.10	-0.18	0.09
Member of workforce	-0.11	0.09	-0.11	0.10	-0.12	0.09
Native-born citizen	-0.26***	0.08	-0.25***	0.08	-0.27***	0.08
Moved within last year	-0.26***	0.07	-0.26***	0.07	-0.27***	0.07
Home ownership	0.32***	0.04	0.34***	0.05	0.31***	0.04
Constant	0.53**	0.19	0.38	0.20	0.51**	0.19
Pseudo R-squared	0.11		0.11		0.11	
N	2,862		2,862		2,862	

* p < 0.05 ** p < 0.01 *** p < 0.001

Note: Two-tailed significance tests were used. Robust standard errors adjusted for state clustering are reported. The CPS population weights were used.

Source: Heritage Foundation calculations.

Variable	Maximum Requirement				Minimum Requirement	
	Model 18		Model 19		Model 20	
	Vercellotti Categories		Recoded States		Vercellotti Categories	
	Coefficient	Robust S.E.	Coefficient	Robust S.E.	Coefficient	Robust S.E.
Sign name	-0.19	0.19	-0.22	0.28	-0.20	0.19
Match signature	0.14	0.19	0.06	0.29	0.10	0.19
Non-photo ID	-0.28	0.21	-0.33	0.29	-0.30	0.21
Photo ID	-0.09	0.21	-0.13	0.29	--	--
Affidavit	--	--	--	--	0.19	0.21
Age 25-44	-0.39**	0.15	-0.39**	0.15	-0.37*	0.15
Age 45-64	-0.04	0.19	0.03	0.19	-0.005	0.19
Age 65+	-0.001	0.32	-0.005	0.32	-0.04	0.32
High school	0.46	0.28	0.47	0.28	0.47	0.28
Some college	0.21	0.43	0.21	0.43	0.22	0.43
College	0.42	0.33	0.42	0.33	0.42	0.33
Graduate school	0.39	0.37	0.39	0.37	0.39	0.37
Family income, \$15,000-\$29,999	-0.06	0.24	-0.06	0.25	-0.05	0.24
Family income, \$30,000-\$49,999	-0.37	0.19	-0.36	0.19	-0.35	0.19
Family income, \$50,000-\$74,999	-0.30	0.23	-0.30	0.23	-0.29	0.23
Family income, \$75,000-\$149,999	0.26	0.23	0.27	0.24	0.25	0.23
Family income, \$150,000 or more	0.09	0.26	0.09	0.27	0.10	0.26
Married	0.36*	0.18	0.36*	0.18	0.34	0.18
Widowed	-0.43	0.32	-0.43	0.32	-0.43	0.32
Divorced	0.13	0.23	0.12	0.23	0.08	0.23
Separated	0.19	0.41	0.18	0.41	0.15	0.41
Female	0.13	0.07	0.14***	0.07	0.13	0.07
Battleground state	0.23	0.13	0.24	0.13	0.17	0.13
Competitive race	0.30	0.21	0.30	0.20	0.21	0.21
Employed	-0.28	0.37	-0.28	0.37	-0.28	0.37
Member of workforce	0.59	0.43	0.59	0.43	0.58	0.43
Native-born citizen	0.11	0.14	0.11	0.14	0.13	0.14
Moved within last year	-0.41**	0.13	-0.42***	0.13	-0.45***	0.13
Home ownership	-0.09	0.10	-0.09	0.10	-0.11	0.10
Constant	0.40	0.48	0.44	0.55	0.46	0.48
Pseudo R-squared	0.11		0.11		0.10	
N	1,029		1,029		1,029	

* p < 0.05 ** p < 0.01 *** p < 0.001

Note: Two-tailed significance tests were used. Robust standard errors adjusted for state clustering are reported. The CPS population weights were used.

Source: Heritage Foundation calculations.

Mr. MCCARTHY. Well, thank you very much, Madam Chair. And if I have any more time, I would like to yield some to the former Chair of the committee, Mr. Vern Ehlers.

Mr. EHLERS. I have no opening statement at this time, but am eagerly looking forward to the results of the hearing. I agree with you that it is overdue. Thank you.

Ms. LOFGREN. Thank you. Other members I think would prefer to put their opening statements in the record.

Ms. LOFGREN. And we will turn now to our first panel. We have both the Chair and the Vice Chair of the EAC. Donetta Davidson, the EAC Chair, previously served as Colorado Secretary of State for 6 years before being appointed to the EAC by President Bush in 2005, and has held elected office as local county clerk and recorder and director of elections for the Colorado Department of State. Ms. Davidson was elected president of the National Association of Secretaries of State that same year, and is a former president of the National Association of State Election Directors.

Rosemary Rodriguez is our EAC Vice Chair. Ms. Rodriguez briefly served as president of the Denver City Council before she was appointed in 2007. She was director of Boards and Commissions for the Mayor of Denver, Denver city clerk and recorder, and acting director of the Denver Election Commission, where she supervised city elections. She has been active in numerous grass-roots civic and voter advocacy organizations, including the Colorado Voter Initiative, where she co-chaired a statewide initiative to allow election day voter registration, and the Latina Initiative, a project to register Latino voters and provide nonpartisan election information to the Latino community. We welcome you both.

We look forward to hearing your statements. Your complete statements will be made a part of our official record. We would ask that you summarize your statements in 5 minutes. And that little machine there on the desk, it has lights. And when the yellow light goes on, it means you have only got 1 minute left. And when the red light goes on, it means that your time has expired. And at that point we would ask you to summarize as quickly as you can so that we can get to our next panel.

So Ms. Davidson, if you would begin, welcome to our hearing.

STATEMENT OF DONETTA DAVIDSON, CHAIR, U.S ELECTION ASSISTANCE COMMISSION; AND ROSEMARY RODRIGUEZ, VICE CHAIR, U.S. ELECTION ASSISTANCE COMMISSION

Ms. DAVIDSON. Thank you. Good afternoon, Chair Lofgren and Ranking Member McCarthy. My name is Donetta Davidson, and first of all, I very proudly would like to introduce my two granddaughters, which are visiting D.C. For the very first time—

Ms. LOFGREN. How wonderful.

Ms. DAVIDSON. Brittany and Nicole Berrich. So to get to be here, I think it is very special. Thank you.

Ms. LOFGREN. Would they stand up so that we can recognize them? It is embarrassing, but you need to be proud to have your family here.

Ms. DAVIDSON. Thank you, Madam Chair. As I said, it is an honor to be here, and I really appreciate being able for you to give

us this opportunity to provide you an update about the U.S. Election Assistance Commission.

Since the 2000 Presidential election, we have seen sweeping changes in the way we have conducted elections. The passage of the Help America Vote Act expanded opportunities for people with disabilities and those with alternative language needs. Provisional voting is now required in every State. Thanks to statewide voter registration databases, the voter rolls are cleaner, more accurate. Modern voting technology has been purchased, thanks to the more than \$3 billion distributed by HAVA.

HAVA also created the EAC, which opened its doors officially in 2004. Since then we have hit the ground running and we have not slowed down since. The EAC already has issued updates on voting system guidelines, established the Federal Government's first voting system test program; we have issued two reports on the impact of the national Voter Registration Act, a report on military and overseas voters, the 2004 election day survey, a Spanish glossary, which I brought one, on election terms.

And we are especially proud of our Election Management Project, which underneath that we have issued voting systems security, testing, certification, ballot preparation, and training for poll workers. We got started with \$1.2 million in 2004, and thanks to Congress recognizing our limitations, they increased the funding in our subsequent years.

Also I want to say in public how proud I am of our staff. They have done a lot with very little and done it quite well.

The other study that we have drawn a lot of fire on is our election crime report. This report was an initial study of voter fraud and voter intimidation. These topics are very controversial, and opinions are sharply split down partisan lines. We made tough decisions about the data we received from the consultant. If statements were not supported by the data, we did not adopt the statements in our final report. I know you will have questions about this report, and I look forward to setting the record straight in a public setting.

As I said, the EAC had to get started very quickly to meet the obligations underneath HAVA. Unfortunately, that meant we put our establishing the Commission's policies and procedures on the back burner. Our priority was first to get the money to the States and help them interpret the laws.

Now we have work to be done initially internally. As the Chair, I have already made some sweeping changes. Bipartisan committees to oversee research and all EAC operations. Contract procurement has been outsourced to another entity. And I have asked, along with the other commissioners, for the Inspector General to do a review of our procedures and policies. We will take their recommendations very seriously, and we will make the necessary changes. No mistake, there is always room for improvement, but we have produced results and we have a great potential to continue to help election officials throughout the Nation. I do look forward to your questions.

Ms. LOFGREN. Thank you very much for your testimony and also for staying with our 5-minute rule. And now we would turn to you, Ms. Rodriguez. Welcome.

Ms. RODRIGUEZ. Thank you, Madam Chairwoman, and Mr. McCarthy for inviting us here today.

Ms. LOFGREN. I am not sure your microphone is on. There is a little button there. There you go.

STATEMENT OF ROSEMARY RODRIGUEZ

Ms. RODRIGUEZ. Thank you, Madam Chair, and Ranking Member McCarthy for inviting me to give comments today. As a new member of the Election Assistance Commission, I believe it is an important and necessary agency. Our primary goal must be to ensure that every eligible American has the best chance to cast a ballot and see it counted. While we must work with election officials to ensure that they have the tools to do their job, our first allegiance must always be to the voters. Conflicts between these interests are exceedingly rare, but when an issue arises that creates tension, we have a duty to come down on the side of the voter.

I emphasize that the EAC has accomplished much since Congress enabled it, and I commend current commissioners and those who preceded me for their diligence and hard work. But to fulfill our mandates, we need to do more.

First, the Commission must become fully transparent and accountable. Any hint of secrecy, political motivation, or political litmus in those who administer elections is anathema to all Americans. Therefore, the EAC must disavow any procedures that suggest a hidden agenda and invite cynicism. At my first commission meeting, I recommended that the EAC conduct staff briefings and make policy decisions in sunshine, limiting the tally vote to only the most routine decisions. And as long as I am a commissioner, I will continue to urge it to adopt these and other policies and procedures, and to memorialize them in written documents that are available to the public. Only then can the public see the decisions the EAC is making, understand the reasons for them, and know they are being made to benefit the election process for voters, rather than for partisan gain.

Second, the Commission must become transparent and accountable in its accounting procedures and research protocols. We have already begun this, and my Chair did discuss her request to the Inspector General to conduct a thorough review. I mentioned this review specifically because I know that our handling of the research projects created confusion and speculation. We should accept well-founded criticism on their handling, and take steps to ensure that the errors we made do not happen again. We expect the IG's report soon, and I anticipate that the Commission will make its recommendations the keystone of our future work plan.

Finally, we should better inform our oversight committees and all interested Members of Congress of our activities.

Let me briefly mention two other items. States are establishing statewide voter databases required by HAVA. I am hopeful that when they are completed we will be able to say with confidence to you and to the American people that they are accurate and efficient. That is not a foregone conclusion. The databases are difficult to build and maintain, and you may want to invite us back to report on their progress.

Congressional staff members have asked about provisional ballots. The Congress authorized the use of the provisional ballot to make sure that voters were provided with every opportunity that their ballot would count. They should never be used as a tool to disenfranchise voters, and I believe we should continually monitor their usage.

I am having a series of meetings with voters and voter advocates in anticipation of the 2008 election, and it will be my goal to make sure that the issues they identify are those considered and addressed by the EAC as the country prepares for 2008.

In conclusion, the EAC commissioners and staff want to see the promise of HAVA fulfilled. We want voters in America to be confident in equipment that we certify. We want election officials to adopt our guidelines because they are thorough and reasonable. We want the States to implement voter databases that guarantee voter access, not impede it. And finally, we want to see Americans believe and trust the results of our elections. Thank you.

[The statement of Ms. Davidson and Ms. Rodriguez follows:]



UNITED STATES ELECTION
ASSISTANCE COMMISSION

TESTIMONY

OF

HONORABLE DONETTA DAVIDSON, CHAIR,
AND
HONORABLE ROSEMARY RODRIGUEZ, VICE CHAIR,
U.S. ELECTION ASSISTANCE COMMISSION

BEFORE THE

HOUSE COMMITTEE ON HOUSE ADMINISTRATION,
ELECTIONS SUBCOMMITTEE

THURSDAY, AUGUST 2, 2007

*U.S. Election Assistance Commission
1225 New York Ave., NW – Suite 1100
Washington, DC 20005*



U.S. Election Assistance Commission
Testimony before the U.S. House Committee on House Administration
Subcommittee on Elections
August 2, 2007

Good afternoon Chairwoman Lofgren, Ranking Member McCarthy, and Members of the Subcommittee. We are pleased to be here this afternoon on behalf of the U.S. Election Assistance Commission (EAC) to discuss the changes in election administration that have been effectuated by the Help America Vote Act of 2002 (HAVA) and the role that EAC plays in supporting the States and local governments in implementing HAVA.

INTRODUCTION

EAC is a bipartisan commission consisting of four members: Donetta Davidson, Chair; Rosemary Rodriguez, Vice Chair; Gracia Hillman; and Caroline Hunter. EAC's mission is to guide, assist, and direct the effective administration of Federal elections through funding, innovation, guidance, information and regulation. In doing so, EAC has focused on fulfilling its obligations under HAVA and the National Voter Registration Act (NVRA). EAC has employed four strategic objectives to meet these statutory requirements: Distribution and Management of HAVA Funds, Aiding in the Improvement of Voting Systems, National Clearinghouse of Election Information, and Guidance and Information to the States. Below we will discuss the accomplishments in each of these areas and what Congress, States, and the public at large can expect from EAC in the coming year.

DISTRIBUTION AND MANAGEMENT OF HAVA FUNDS

Distribution and Use of HAVA Funds

In Fiscal Years 2003 and 2004, Congress appropriated approximately \$3.1 billion in funding under HAVA's various funding programs. Before the formation of the EAC, the U.S. General Services Administration (GSA) distributed payments under HAVA Title I, Sections 101 and 102 totaling \$649.5 million to States between April 2003 and August 2003. EAC distributed additional payments under HAVA Title II, Section 251 totaling more than \$2.3 billion between June 2004 and December 2005. All funds appropriated under these provisions of HAVA have been distributed to States.

In a recently released report to Congress on the spending of HAVA funds, EAC reported that, based upon the annual reports filed by State recipients, States have spent 60 percent (\$1,781,943,111) of HAVA funds received. This leaves just over \$1.3 billion remaining unspent or unobligated at this point.



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Total HAVA Received by States; Total State Expenditures of HAVA Funds; and Remaining Balance of Funds and Interest				
State	Total HAVA Funds Received	Expended^a	Percentage of Funds Expended	Balance^b
Alabama	\$40,907,194	\$12,947,460	31.65	\$29,651,133
Alaska	16,596,803	8,006,393	48.24	10,367,582
American Samoa	3,319,361	3,371,840	101.58	0
Arizona	47,600,072	13,740,471	28.87	37,432,722
Arkansas	27,761,472	16,423,388	59.16	14,365,587
California	348,900,661	280,638,373	80.44	78,030,487
Colorado	41,582,761	22,849,704	54.95	22,157,712
Connecticut	32,719,501	3,096,045	9.46	34,936,789
Delaware	16,596,803	7,735,905	46.61	9,374,974
District of Columbia	16,596,803	4,918,303	29.63	12,909,938
Florida	158,531,048	73,304,281	46.24	94,244,933
Georgia	77,304,946	73,140,615	94.61	5,324,478
Guam	3,319,361	1,866,693	56.24	1,452,668
Hawaii	16,596,803	6,191,808	37.31	10,674,907
Idaho	16,596,803	8,741,234	52.67	8,755,567
Illinois	143,529,899	94,511,610	65.85	55,379,615
Indiana	64,297,862	56,297,878	87.56	8,078,612
Iowa	28,739,383	24,232,850	84.32	4,662,077
Kansas	26,409,789	19,275,443	72.99	9,140,051
Kentucky	38,067,744	19,355,672	50.85	20,726,784
Louisiana	47,330,777	34,859,102	73.65	15,287,651
Maine	16,596,803	3,321,221	20.01	13,275,584
Maryland	\$49,752,770	\$35,713,473	\$71.78	\$17,297,799
Massachusetts	60,332,104	5,276,401	8.75	58,995,914
Michigan	94,699,081	67,003,920	70.75	32,459,061
Minnesota	44,492,574	37,688,821	84.71	6,690,119
Mississippi	27,869,654	20,139,498	72.26	9,171,324
Missouri	62,262,661	45,773,331	73.52	20,105,989
Montana	16,596,803	13,264,106	79.92	3,595,165
Nebraska	18,749,549	14,690,310	78.35	5,046,964
Nevada	21,166,810	12,497,029	59.04	9,359,448
New Hampshire	16,596,803	335,689	2.02	16,596,803
New Jersey	84,904,403	55,933,253	65.88	28,519,543
New Mexico	19,279,790	14,123,471	73.26	9,014,194
New York	219,512,672	3,144,170	1.43	224,694,515
North Carolina	74,259,370	49,200,344	66.25	33,102,811
North Dakota	16,596,803	8,367,713	50.42	8,838,732
Ohio	132,045,112	131,682,814	99.73	8,613,372
Oklahoma	32,659,638	2,619,668	8.02	30,039,970
Oregon	33,863,940	13,993,020	41.32	20,230,033
Pennsylvania	134,818,949	124,793,466	92.56	26,155,774

*This information is property of the U.S. Election Assistance Commission,
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Total HAVA Received by States; Total State Expenditures of HAVA Funds; and Remaining Balance of Funds and Interest				
State	Total HAVA Funds Received	Expended^a	Percentage of Funds Expended	Balance^b
Puerto Rico	5,470,505	922,763	16.87	5,023,981
Rhode Island	16,596,803	14,117,981	85.06	2,478,822
South Carolina	39,241,210	40,362,239	102.86	3,684,755
South Dakota	16,596,803	5,635,898	33.96	11,702,173
Tennessee	54,714,608	21,048,399	38.47	37,009,309
Texas	184,168,065	128,504,360	69.78	64,292,305
Utah	25,284,969	22,708,000	89.81	4,115,977
Vermont	16,596,803	2,692,784	16.22	15,030,010
Virgin Islands	3,319,361	1,286,780	38.77	2,444,869
Virginia	69,121,820	35,308,415	51.08	37,064,507
Washington	60,093,850	26,081,858	43.40	37,116,984
West Virginia	20,630,100	12,934,539	62.70	8,768,045
Wisconsin	50,066,781	17,948,603	35.85	35,293,708
Wyoming	16,596,803	7,323,706	44.13	10,606,567
Total	2,968,860,616	1,781,943,111	60.02	1,339,389,395
^a Expenditures include cash disbursements and unliquidated obligations. For Sections 101 and 102, the expenditures are as of December 31, 2006. For Section 251, the expenditures are as of September 31, 2006. ^b The balance is greater than the difference between funds received and expenditures in most cases because it includes interest earned on funds deposited in State election fund accounts. ^c South Carolina reported that it overspent its Section 251 funds which resulted in total expenditures exceeding funds received. The balance shown in this table consists of remaining Section 101 and 102 funds.				

EAC's report identified that 76 percent of the funds expended to date have been used to purchase or upgrade voting systems and statewide voter registration databases as required by sections 301 and 303 of HAVA; 16 percent of the funding was used by States to improve the administration of elections for Federal office; 8 percent of expenditures were not classified by the State recipients, and less than one-tenth of one percent of the available funding was used to implement the provisional voting and polling place signage requirements of Section 302 of HAVA.

EAC has received certifications from 8 States or territories declaring that they have met all of the requirements of Title III of HAVA, including (1) implementing HAVA compliant voting systems; (2) implementing a program of provisional voting; (3) developing and posting polling place signage as required by HAVA; (4) establishing and implementing a statewide voter registration list as required by HAVA; and (5) implementing the identification and verification procedures required by HAVA.



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State	Certification Filed*			
	State Has Met Title III Requirements [251(b)(2)(A)]	Date of Filing	State Will Use Up to Minimum Amount [251(b)(2)(B)]	Date of Filing
American Samoa	Yes	12/26/2005		
California			Yes	04/03/2006
Florida	Yes	08/28/2006	Yes	03/13/2006
Illinois			Yes	03/20/2007
Kentucky	Yes	01/16/2007		
Maryland	Yes	05/15/2007		
New Jersey	Yes	06/25/2007		
North Carolina	Yes	03/28/2007		
North Dakota			Yes	04/28/2005
Ohio			Yes	04/24/2007
Oregon	Yes	07/06/2006		
South Dakota	Yes	03/15/2007		
Virginia			Yes	04/13/2006

EAC will forward certifications received under HAVA Section 251(b)(2)(A) to the Voting Section of the Civil Rights Division of the U.S. Department of Justice, because the Division is charged with enforcing the uniform and nondiscriminatory election technology and administration requirements of Title III of HAVA. These certifications will also be forwarded to the OIG for potential review of compliance with the requirements of Title III during OIG audits.

In Fiscal Year 2007, Congress extended the deadline for the use and expenditure of HAVA Section 102 funds. These funds were limited to the replacement of punch card and lever voting systems that were in use during the 2000 Federal General Election. The change in the law affects States that sought and received a waiver of the original November 2004 deadline. The States that obtained a waiver now have until the first Federal election following March 1, 2008 to use remaining Section 102 funding to replace all punch card and lever voting systems. The following States sought and received a waiver of the original, November 2004 deadline:

State	Date of Waiver
Arkansas	December 23, 2003
California	December 23, 2003
Colorado	December 23, 2003
Illinois	July 8, 2003



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State	Date of Waiver
Indiana	December 29, 2003
Kentucky	December 5, 2003
Indiana	December 5, 2003
Massachusetts	December 23, 2003
Michigan	December 30, 2003
Mississippi	December 16, 2003
Missouri	December 11, 2003
New Jersey	December 23, 2003
New York	December 23, 2003
North Carolina	December 11, 2003
Ohio	December 24, 2003
Pennsylvania	December 23, 2003
Tennessee	December 23, 2003
Texas	December 23, 2003
Utah	December 17, 2003
Virginia	December 4, 2003
Washington	December 12, 2003
West Virginia	December 17, 2003
Wisconsin	December 23, 2003

Management of HAVA Funds

To assure that States are properly using HAVA funds, EAC has implemented reporting requirements, educational tools and training, and audits. Each recipient of HAVA funds distributed either by EAC or GSA, prior to the existence of EAC, is required to file annual reports regarding their use of HAVA funds. Because there are three separate sources of HAVA funding, States file reports on each of the separate funding sources: Section 101 funding, Section 102 funding and Section 251 funding. Reports on Section 101 and Section 102 funding are due on February 28 of each calendar year and report on the preceding calendar year. Reports regarding the use of Section 251 funds are due on March 30 of each year and report on the use of funds during the preceding Federal fiscal year.

EAC has conducted a number of training sessions and developed tools to assist the States with understanding not only the proper uses of HAVA funds but also the proper means to report these expenditures. The Commission performed the following activities to assist States in the use and reporting of HAVA funds:

- Distributed and posted on www.eac.gov a guide for managing, recordkeeping, reporting and auditing HAVA funds.



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- Presented training on using and accounting for HAVA funds in conjunction with the National Association of Secretaries of State and the National Association of State Election Directors meetings.
- Presented training on the negotiation of indirect cost rates.
- Negotiated indirect cost rates with States.
- Responded to questions from State administrators about the appropriate uses and reporting of HAVA funds.
- Distributed and posted on www.eac.gov a list of frequently asked questions on reporting requirements and the proper use of HAVA funds.
- Mailed to the States and posted on www.eac.gov sample Standard Forms 269 for reporting Title I and Section 251 funds, and sample narratives showing supporting information.
- Distributed and published formal advisories on www.eac.gov regarding maintaining effort when using requirements payments, treating income earned on HAVA funds, accounting for interest earned on HAVA funds, calculating the 5-percent matching requirement, and using county funds to match requirements payments.
- Sent annual reminders to States about their reporting responsibilities.
- Established a comprehensive, uniform review process for annual State financial reports.
- Reviewed and resolved audits of HAVA funds prepared by State auditors and the EAC Office of Inspector General (OIG). Resolution documents are available at www.eac.gov.

Last, EAC has implemented an audit program to review the States' expenditures of HAVA funds. These audits are conducted by the EAC Office of Inspector General (OIG), under both its authority as stated in HAVA and under the authority of the Inspector General Act. Through December 2006, the OIG audits focused on State administration of HAVA Section 101, 102, and 251 funds. The OIG issued 11 final reports on States that reported some of the largest expenditures of HAVA funds. The audited States reported more than 59 percent of total reported expenditures of Section 101, 102, and 251 funds through December 31, 2006. The following table lists the States



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audited as of June 8, 2007, amounts audited, reported expenditures, and HAVA funds received.

Office of Inspector General Audits of States				
State	HAVA Funds Audited		Reported Expenditures	Total HAVA Funds Received
	Amount	As of		
California	\$14,922,867	12/31/04	\$280,638,373	\$348,900,661
New Jersey	16,771,106	12/31/05	55,933,253	84,904,403
Texas	29,912,682	12/31/05	128,504,360	184,168,065
Georgia	63,562,054	12/31/05	73,140,615	77,304,946
Pennsylvania	17,459,399	12/31/05	124,793,466	134,818,949
Illinois	30,090,394	12/31/05	94,511,610	143,529,899
Maryland	26,683,205	12/31/05	35,713,473	49,752,770
South Carolina	35,165,678	12/31/05	40,362,239	39,241,280
Ohio	114,741,683	6/30/06	131,682,814	131,682,814
Virginia	33,270,545	8/31/06	35,308,415	69,121,820
Indiana	56,297,878	8/31/06	56,297,878	64,297,862
	438,877,491		1,056,886,496	1,327,723,469

These 11 audits could result in the repayment of up to \$3.2 million to either the States' HAVA funds or to the U.S. Treasury. Audits commenced during the 2007 Federal fiscal year involve the following States: New Mexico, Rhode Island, Missouri, Kentucky, and Wyoming. Generally, the OIG schedules States for audit on the basis of the highest amount of reported expenditures and will continue this strategy until all States are audited.

AIDING IN THE IMPROVEMENT OF VOTING SYSTEMS

Effective administration of voting systems requires the use of accurate, reliable, accessible and auditable voting systems. There are various opinions on what constitutes accurate, reliable, accessible and auditable, but one clear source is the Help America Vote Act of 2002 (HAVA). HAVA establishes the following requirements for voting systems, used in Federal elections:

- Allow the voter the ability to change his or her selections prior to casting a vote;
- Notify the voter of an overvote and the consequences of casting an overvote;
- Provide a permanent paper record of the election that is auditable;
- Provide accessibility to individuals with disabilities including persons who are blind or visually impaired;
- Provide accessibility to persons for whom English is not their first language when required by Section 203 of the Voting Rights Act; and
- Meet or exceed the error rate as established in the 2002 Voting System Standards developed by the Federal Election Commission.



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HAVA Section 301; 42 U.S.C. Section 15481 requires that all voting systems used in an election for Federal office meet or exceed these requirements. A [chart](#) showing the funds distributed to each State is found on EAC's Web site, www.eac.gov.

In addition, HAVA also required EAC to develop guidelines for testing voting systems and required EAC to establish a program to test voting systems using Federally accredited laboratories. These guidelines and testing and accreditation processes establish a means to determine whether voting systems meet the base-line requirements of HAVA and the more descriptive and demanding standards of the voluntary voting system guidelines developed by EAC. This process provides assurance to election officials and members of the public that the voting systems that they use will perform in a manner that is accurate, reliable, accessible and auditable.

Voluntary Voting System Guidelines (VVSG)

One of EAC's most important mandates is the testing, certification, decertification and recertification of voting system hardware and software. Fundamental to implementing this key function is the development of updated voting system guidelines, which prescribe the technical requirements for voting system performance and identify testing protocols to determine how well systems meet these requirements. EAC along with its Federal advisory committee, the Technical Guidelines Development Committee (TGDC), and the National Institute of Standards and Technology (NIST), work to develop voluntary testing standards.

History of Voting System Standards and Guidelines

The first set of national voting system standards (VSS) was created in 1990 by the Federal Election Commission (FEC). In 2002, FEC updated the standards, and HAVA mandated that EAC develop a new iteration of the standards—which would be known as the Voluntary Voting System Guidelines (VVSG)—to address advancements in information security and computer technologies as well as improve usability.

HAVA mandated a 9-month period for the TGDC to develop the initial set of VVSG. The TGDC, working with NIST, technology experts, accessibility experts, and election officials, completed the first draft and delivered it to EAC in May 2005. In addition to providing technical support to the TGDC, NIST also reviewed the 2002 Voting System Standards (2002 VSS) to identify issues to be addressed in the 2005 guidelines, drafted core functional requirements, categorized requirements into related groups of functionality, identified security gaps, provided recommendations for implementing a voter-verifiable paper audit trail, and provided usability requirements. NIST also updated the VVSG's conformance clause and glossary.



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On December 13, 2005, EAC adopted the first iteration of the Voluntary Voting System Standards (VVSG). Before the adoption of the VVSG, EAC conducted a thorough and transparent public comment process. After conducting an initial review of the draft VVSG, EAC released the two-volume proposed guidelines for public comment for a period of 90 days; during this period, EAC received more than 6,000 comments. Each comment was reviewed and considered before the document was finalized and adopted. The agency also held public hearings about the VVSG in New York City, NY, Pasadena, CA, and Denver, CO.

The VVSG was an initial update to the 2002 Voting System Standards focusing primarily on improving the standards for accessibility, usability and security. The VVSG also establishes the testing methods for assessing whether a voting system meets the guidelines. In many areas, these guidelines provide more information and guidance than HAVA. For example, these testing guidelines incorporated standards for reviewing voting systems equipped with voter verifiable paper audit trails (VVPAT) in recognition of the many States that now require this technology. Likewise, in the area of accessibility, the guidelines require that if the VVPAT is used as the official ballot, the paper record be made accessible to persons with disabilities, including persons with visual impairments or disabilities. Volume I of the VVSG, *Voting System Performance Guidelines*, includes new voluntary requirements for accessibility, usability, voting system software distribution, system setup validation, and wireless communications. It provides an overview of the voluntary requirements for independent verification systems, including voluntary requirements for a voter-verified paper audit trail for States that require this feature for their voting systems. Volume I also includes the requirement that all voting system vendors submit software to a national repository, which will allow local election officials to make sure the voting system software that they purchase is the same software that was certified.

Volume II of the VVSG, *National Certification Testing Guidelines*, describes the components of the national certification testing process for voting systems, which will be performed by independent voting system test labs accredited by EAC. EAC is mandated by HAVA to develop a national program to accredit test laboratories and certify, decertify, and recertify voting systems. The VVSG and the comments received from the public about the guidelines are available at www.eac.gov.

The Future of the Voluntary Voting System Guidelines

Significant work remains to be done to fully develop a comprehensive set of guidelines and testing methods for assessing voting systems and to ensure that they keep pace with technological advances. TGDC and NIST have been working since the development of the initial iteration of the VVSG in 2005 to revise that version and to completely review and update the 2002 Voting System Standards that were developed by the FEC. The next iteration of the VVSG, which EAC anticipates receiving from TGDC later this year, will include the following elements:



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- Software independence – use of verifiable voting records for independent audits;
- Prohibition of RF wireless;
- A process to include new and innovative voting systems with greater usability, accessibility, and security;
- Improved methods for measuring reliability and accuracy of voting systems;
- Improved and updated usability and accessibility requirements;
- Improved requirements for the overall reliability of voter verifiable paper audit trail voting systems.

There are, of course, several pieces of pending legislation, which if passed would significantly impact the next iteration of the VVSG. These bills focus on mandating the use of voter verifiable paper audit trails (VVPAT) with specific tolerances for paper record retention. Even though the VVSG included requirements for those States requiring VVPAT, EAC and NIST are closely monitoring these bills to determine if additional work will need to be performed on standards prior to release of the next iteration.

EAC has also directed NIST to develop a uniform set of test methods that can be applied to the testing of voting equipment. Currently, accredited laboratories develop their own test methods to test voting equipment. After the completion of these uniform test methods, every accredited lab will use the same test to determine if a voting system conforms to the VVSG. This is a long and arduous process as test methods must be developed for each type and make of voting system. Work is beginning in 2007 on these methods, but will likely take several years to complete.

Voting system testing and certification and laboratory accreditation

Accreditation of Voting System Testing Laboratories

HAVA Section 231 requires EAC and NIST to develop a national program for accrediting voting system testing laboratories. The National Voluntary Laboratory Accreditation Program (NVLAP) of NIST provides for the initial screening and evaluation of testing laboratories and will perform periodic re-evaluation to verify that the labs continue to meet the accreditation criteria. When NIST has determined that a lab is competent to test systems, the NIST director recommends to EAC that a lab be accredited. EAC then makes the determination to accredit the lab. EAC issues an accreditation certificate to approved labs, maintains a register of accredited labs and posts this information on its Web site.



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HAVA required that NIST deliver its first set of recommended labs to the EAC “[n]ot later than 6 months after the Commission first adopts the voluntary voting system guidelines.” See HAVA Section 231(b), 42 U.S.C. 15371(b). This deadline passed in June 2006. Four laboratories applied to NIST for evaluation prior to the HAVA deadline, but the required technical reviews and on-site assessments were not completed by the deadline. The first set of NIST recommended laboratories were not received by the EAC until January 18, 2007. EAC conducted additional review of the laboratories’ conflict of interest policies, organizational structure, and record keeping protocols. This review was conducted efficiently, so that EAC could move forward with accrediting the first voting system testing laboratories under its new program. The first two laboratories were accredited by EAC at its public meeting on February 21, 2007. These two labs, SysTest and iBeta, are now accredited to test to the 2005 VVSG. In addition, EAC has received an additional recommendation and accredited another laboratory, InfoGuard, to the 2005 VVSG under the EAC-NIST accreditation program.

The Need for EAC Interim Accreditation of Laboratories

Obviously, the need for EAC to provide accredited laboratories arose well before NIST’s initial, January 18 recommendation. First, toward the end of 2005, NIST informed the EAC that the expected timeline to complete required document collection and review, pre-assessment and formal on-site assessments of applicants made it highly unlikely that it would be able to provide a list of recommended laboratories before the end of 2006. This determination made it clear that the EAC would need to have an alternative, temporary process in place to provide accredited laboratories if it wished to implement its certification program in time for the 2006 election. Furthermore, in July of 2006, the National Association of State Election Directors (NASSED) informed EAC that the organization was terminating its voting system qualification program. NASSED is a non-governmental, private organization that accredited laboratories and qualified voting systems to Federal standards for more than a decade. The organization’s decision to terminate its voting system qualification program just before the 2006 general election required EAC to take immediate action. Without an entity to approve required voting system modifications for the 2006 election, some State election officials would be unable to field their HAVA-compliant systems. To address these situations, EAC was compelled to do two things (1) provide for interim, temporary accreditation of testing laboratories to test to the 2002 VSS and (2) initiate a preliminary, pre-election phase of its voting system testing and certification program.¹

¹ The pre-election phase of EAC’s certification program was not originally planned, but was ultimately required to serve election officials and the public. The program began on July 24, 2006. The purpose of the pre-election phase of the program is to provide voting system manufacturers with a means to obtain a Federal Certification of voting system modifications during the vital period immediately prior to the November 2006 General Elections. Many States require a Federal or national certification as a condition of state certification. Historically, the three to four month period immediately preceding a General Election produces a number of emergent situations that require the prompt modification of voting systems. These



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EAC needed to provide 2002 VSS-accredited labs on a temporary, interim basis to ensure that the agency had the means to implement its certification program. Additionally, EAC would be compelled to implement a provisional, pre-election certification program to replace services offered by NASED. EAC could not wait for NIST to recommend laboratories. Fortunately, HAVA provided a mechanism for EAC to take such action in Section 231(b)(2)(B). This section requires that EAC publish an explanation when accrediting a laboratory without a NIST recommendation. A notice was published on EAC's Web site (www.eac.gov) to satisfy this requirement.

EAC's Interim Accreditation Program

At a public meeting in August 2005 held in Denver, the commissioners received a staff recommendation outlining the details of the interim accreditation program. The staff recommendation included a process in which the three laboratories previously accredited by NASED – CIBER, SysTest Labs, and Wyle Laboratories – would be allowed to apply for interim accreditation. In December of 2005, EAC officially began accepting applications for a limited interim accreditation program. As stated in the letters, the purpose of the interim accreditation program was to provide accredited laboratories that could test voting systems to Federal standards, until such time as NIST/NVLAP was able to present its first set of recommended laboratories. This accreditation was limited in scope to the 2002 Voluntary Voting System Standards and required the laboratory to apply to the NVLAP program with the intent to receive a permanent accreditation. The letters also sought variety of administrative information from the laboratories and required them to sign a Certification of Laboratory Conditions and Practices. This certification required the laboratories to affirm, under penalty of law, information regarding laboratory personnel, conflict of interest policies, recordkeeping, financial stability, technical capabilities, contractors, and material changes.

In order to accredit a laboratory, even on an interim basis, EAC needed to contract with a competent technical expert to serve as a laboratory assessor. EAC sought a qualified assessor with real-world experience in the testing of voting systems. The contractor reviewed each of the laboratories that applied. The review was performed in accordance with international standards, the same standards used by NVLAP and other laboratory accreditation bodies. This standard is known as International Standard ISO/IEC 17025, *General Requirements for the Competence of Testing and Calibration Laboratories*. In

changes are often required by State or local election officials and must be made prior to Election Day. To this end, the pre-election phase of the EAC's Certification Program was designed to meet the immediate needs of election officials from the date NASED terminated its qualification program until after the November 2006 General Election. The pre-election requirements of the certification program were narrowly tailored to meet these needs. Additionally, the pre-election phase of the program was drastically limited in scope, (1) it did not certify voting systems, just modifications and (2) the certification was provisional and, thus, expired after the November 2006 election.



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addition, the EAC assessor (who also currently serves as a NVLAP assessor) applied NIST Handbooks 150, *Procedures and General Requirements* and NIST Handbook 150-22, *Voting System Testing*.

CIBER, SysTest Labs, and Wyle Laboratories applied for accreditation under the interim program. Each, as required, had previously received a NASED accreditation. EAC's assessor visited each of the labs and conducted a review consistent with the standards noted above. The assessor reviewed laboratory policies, procedures and capabilities to determine if the laboratories could perform the work required. Laboratory assessments do not make conclusions regarding past laboratory work product. Two of the applicant laboratories, SysTest Laboratories, L.L.C., and Wyle Laboratories, Inc. received an interim accreditation. The assessor's reports and EAC action regarding these laboratories are available on the EAC Web site, www.eac.gov.² EAC promptly published on its Web site information regarding its decision on accreditation (August and September of 2006). This notice provides brief background on the interim accreditation process, starting with the fact that three previously NASED accredited laboratories were invited to apply to the program, including information on the program's requirements and limitations, and ending with the identity and contact information of the two laboratories accredited. Information was also electronically forwarded to EAC's list of stakeholders via e-mail. The EAC stakeholders e-mail list includes almost 900 election officials and interest groups, nationwide. Staff members for EAC oversight and appropriations committees are included in this list of stakeholders. In addition to EAC's Web site and e-mail announcements, on September 21, 2006 EAC's Executive Director reiterated the Commission's decision at a public meeting Web cast to the EAC Web site. This announcement identified the interim accredited labs by name. Furthermore, in October 26, 2006, the two interim accredited laboratories testified at EAC's nationally televised public meeting.

The third laboratory, CIBER, did not meet the requirements for accreditation under EAC's interim accreditation program. On June 13, 2007, EAC notified CIBER that due to this change and the ending of the interim accreditation program, EAC would no longer consider CIBER's application for interim accreditation. Copies of the letter that was sent to CIBER and the press release concerning the vote taken by the Commission are available on EAC's Web site, www.eac.gov. CIBER has applied to NVLAP to become accredited to the 2005 VVSG under the full certification program. EAC will await action and recommendation by NVLAP prior to any further consideration of CIBER as an EAC-accredited laboratory.

² Note: The Wyle and CIBER assessments were completed as a joint report. The two labs have a cooperative agreement to work together in testing voting systems (Wyle performing hardware testing and CIBER software testing).



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Voting System Certification

In 2007, EAC assumed the responsibility of certifying voting systems according to national testing guidelines. Previously, NASED qualified voting systems to both the 1990 and 2002 Voting System Standards. EAC's certification process constitutes the Federal government's first efforts to standardize the voting system industry.

In July 2006, EAC implemented its pre-election certification program, which only focused on reviewing changes or modifications that were necessary for modifications to systems that would be used during the November 2006 elections. Three modifications were reviewed and approved under the pre-election program. Those modifications were approved only conditionally. The condition was that the authorization for the modification expired after the 2006 election. After that, no modification will be considered unless the entire system has already received an EAC certification.

In October 2006, EAC published for public comment its post-election certification program. This program encompasses an expanded and detailed review of voting systems, utilizing accredited laboratories and technical reviewers. EAC received more than 400 comments during the public comment period. At a public meeting on December 7, 2006, EAC adopted its Voting System Certification Program, which became effective on January 1, 2007. Since that time, ten manufacturers have registered to participate in the EAC program. The registration process is antecedent and required prior to a manufacturer submitting a system for testing. A list of registered manufacturers is available at www.eac.gov.

Once the manufacturer is registered, it may submit systems for testing to an EAC-accredited testing laboratory. Reports from that laboratory's assessment are provided to EAC for review and action. The reports are reviewed by EAC technical reviewers. If the report is in order and the system is in conformance with the applicable voting system standards or guidelines, the technical reviewers will recommend that EAC grant the system certification. EAC's executive director will consider the recommendation and make the final decision. Once certified, a system may bear an EAC certification sticker and may be marketed as having obtained EAC certification. The EAC's certification process includes assessment of quality control, field monitoring, decertification of voting systems, and enhanced public access to certification information. For more information concerning EAC's Voting System Testing and Certification Program, see the [program manual](#) for this program, which is available on the EAC Web site, www.eac.gov.

Federal Processes Add Transparency and Accountability

The implementation of EAC's Laboratory Accreditation Program and Voting System Testing and Certification Program mark the first time that the Federal government has



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funded and tested both laboratories and voting systems. Both of these testing processes were previously conducted by NASED in a collaborative and voluntary effort without assistance from the Federal government. The Federal government's involvement in these processes will shed light on the rigorous process that ensures that our nation's voting systems are accurate, reliable and ready for service in any election. Unlike NASED, EAC is obligated to conduct accreditation and certification processes that are open and that share information about the results of those tests with the public. EAC has developed its programs with the knowledge that public confidence is critical to the election process and that public confidence comes from public knowledge and understanding of the process. Information about EAC accredited laboratories is available on EAC's Web site, www.eac.gov. Similarly, information about EAC's testing and certification program and any systems that have been tested through that program also will be available on the EAC Web site.

Management Guidelines

Once a State or local election jurisdiction has purchased a new voting system, there is still a great deal of work to be done to assure that elections are conducted properly. Purchasing the right system is in many ways the easy part. Using it properly takes time, planning, and persistent attention to detail.

Election officials must keep in mind that if someone desires to compromise a voting system during an election, that person must have knowledge of the system and access to the system while the election is taking place – a scenario that applies to ballot boxes or e-voting machines. Any discussion or policy about implementing a secure voting system must examine all aspects of the voting process. The bottom line is that real security for any type of voting system – electronic or paper-based – comes from systematic preparation. State officials should ensure that they:

- Prepare systems to prevent tampering;
- Prepare people to detect tampering;
- Prepare poll workers and law enforcement to react to tampering; and
- Prepare election officials to recover by auditing and investigating tampering.

These fundamental election administration processes to protect the entire voting process will always be important, even as voting technology evolves. Focusing solely on the reliability of voting systems is not enough, and a Federal certification for the system cannot take the place of solid, thorough management procedures at the State and local levels to ensure the system is managed, tested, and operated properly.

EAC is working to assist States and local election jurisdictions to identify and manage all of the details surrounding the successful administration of elections. In 2005, EAC began work on a comprehensive set of management guidelines, collaborating with a group of experienced State and local election officials to provide subject matter expertise and to

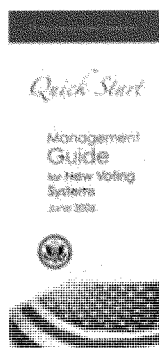


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help develop the guidelines. The project focuses on developing procedures related to the use of voting equipment and procedures for all other aspects of the election administration process. These publications are a companion to the VVSG and assist States and local election jurisdictions with the appropriate implementation and management of their voting systems. The first set of election management guidelines, available at www.eac.gov, were issued this year and covered system security, physical security, and certification. The remaining chapters will be completed in FY 2007; they will be available to all election officials to incorporate these procedures at the State and local levels.

Four *Quick Start Guides* were distributed to election officials prior to the 2006 election. These guides are summaries of more extensive chapters of the Management Guidelines that will be released this year. The guides were sent to election officials throughout the nation and covered topics such as introducing a new voting system, ballot preparation, voting system security, and poll worker training. All *Quick Start* guides are available at www.eac.gov. A brief description of each *Quick Start* guide is provided below.

Quick Start Guide for New Voting Systems

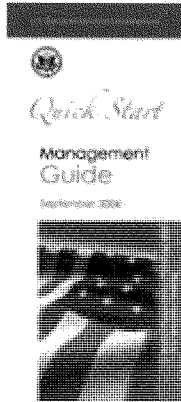


The guide provides a snapshot of processes and procedures election officials should use when introducing a new voting system. It covers receiving and testing of equipment; implementation tips, such as conducting a mock election and developing contingency plans; and programming. The guide also offers Election Day management strategies, including opening the polls, processing voters, and closing the polls.



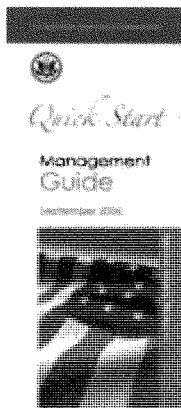
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Quick Start Guide for Ballot Preparation/ Printing and Pre-Election Testing



Ballot preparation and logic and accuracy testing are essential steps to ensure Election Day runs smoothly. The guide offers tips on preparing and printing ballots, which includes confirming that ballots conform to all applicable State laws as well as requiring a multilayered ballot proofing process at each stage of the design and production process. The guide also covers pre-election testing for hardware and software logic and accuracy.

Quick Start Guide for Voting System Security

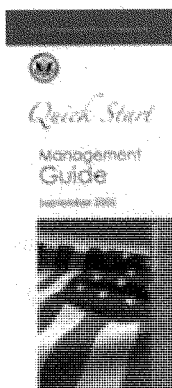


The introduction of new equipment also ushered in concerns regarding voting system security. To address some of those concerns and to help election officials implement effective management procedures, the guide highlights priority items essential to securing these systems. It addresses software security, advising officials to be sure that the software installed on the systems is the exact version that has been certified. The guide advises officials to not install any software other than the voting system software on the vote tabulating computer; to verify that the voting system is not connected to any network outside the control of the election office; and to consider any results transmitted electronically to be unofficial and verify them against results contained on the media that are physically transported to the central office. Also included in the guide are recommendations regarding password maintenance, physical security, personnel security, and procedures to secure the equipment.



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Quick Start Guide for Poll Workers



One of the most challenging tasks for election officials is recruiting and training poll workers. The guide contains information about identifying potential poll workers, effective training programs and techniques, as well as procedures to implement on Election Day.

A full range of Management Guideline documents will be developed to cover topics related to election administration, including:

- Pre-Election Testing
- Ballot Design
- Contingency/Disaster Planning
- Vote by Mail/Absentee Voting
- Military/Overseas Voting
- Polling Place/Vote Center Management

In addition, new *Quick Start* guides are planned for 2007, including guides on the following topics:

- Change Management
- Public Relations
- Contingency/Disaster Planning
- Certification
- Developing an Audit Trail

Proper management of elections is key to conducting a reliable, accurate, open and accessible election. Buying state of the art voting equipment with the latest security features is meaningless unless the door to the storehouse where the voting systems are kept is secured and locked. Similarly, equipment used to program voting systems should never be connected to the Internet. It is EAC's goal to communicate these suggestions



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and requirements to the election officials to help them increase the security and accuracy of their voting equipment by their practices and procedures.

NATIONAL CLEARINGHOUSE AND PROVIDING GUIDANCE AND INFORMATION TO THE STATES

HAVA charges EAC with being a clearinghouse of information on the administration of Federal elections. EAC accomplishes this mandate by providing information on a wide variety of topics including voting systems, testing laboratories, election data, statewide databases, voter registration, innovations in election administration, and many other topics of research and interest to the elections community. In this section, we will focus on the activities that EAC has undertaken in its research and guidance programs to provide helpful information to election administrators and the public about our Federal elections.

Election Data

Following the 2004 Federal elections, EAC conducted three surveys to collect data regarding voter registration, turnout, ballots cast, provisional voting, voting equipment, and voting by military members and overseas citizens. Those three surveys were consolidated into a single [Election Administration and Voting Survey](#) that was used by State election officials to report similar data to that collected in 2004. EAC worked with election officials and academics to improve the quality of the data collected by focusing the questions to solicit more uniform data from all of the 50 States, the District of Columbia and four territories.

States were asked to respond to the survey no later than March 7, 2007. The data was compiled and assessed to determine if there were missing data points or places of inconsistency. Where those were detected, States were asked to revise their submissions. In June of 2007, EAC delivered to Congress its second [report on the implementation of the National Voter Registration Act \(NVRA\)](#). The content of that report was based largely on the results of the 2006 Election Administration and Voting Survey. In addition to this report, EAC will also analyze and synthesize data from the survey to form two additional reports. The first is related to voting by military members and overseas citizens. The second involves more generic election data and will form EAC's second Election Day Survey Report. Both of these reports are anticipated to be released in Fall 2007.

By continuing to compile and further improve the reporting of Federal election data, EAC seeks to become a type of "Census Bureau" of election data. EAC is working to develop a geographically based display of this data so that the public will have a user-friendly interface to information about their States and localities.



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Spanish-English Glossary of Election Terms

At its April 18, 2007 public meeting, EAC adopted an updated glossary of election terms that translates those terms from English to Spanish and vice versa. The Glossary of Key Election Terminology contains 1,843 terms and phrases used in the administration of elections in the United States. To ensure the translations were culturally and linguistically appropriate, terms were translated and reviewed by a multi-dialect team of translators representing four of the main regions of origin of the Hispanic population living in the U.S. Those regions are Mexico, Puerto Rico, Cuba, and Central America. The release of this document marked the first time since 1979 that such an activity had been undertaken. The glossary is available at www.eac.gov.

EAC's work to improve language accessibility to non-English speakers is not done. EAC is currently working to take those same 1,843 terms and phrases and translate those into the five Asian languages that are covered by Section 203 of the Voting Rights Act: Chinese, Japanese, Vietnamese, Korean, and Tagalog.

Products like these will ensure that election officials throughout the country will have the tools that they need to meet the requirements of the Voting Rights Act and to better serve the language-minority populations in their areas.

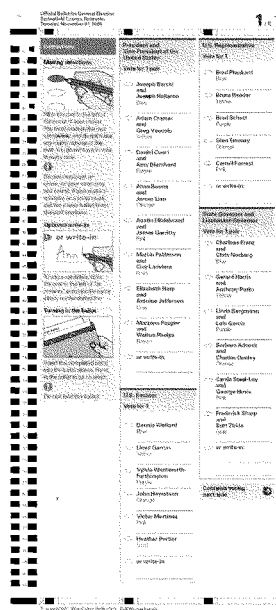
Ballot and Polling Place Sign Design

One challenge that continues to plague election administration throughout the country is the ability to design a ballot that is understandable, user-friendly and affordable. EAC heard the calls of its Board of Advisors and election officials throughout the country to provide sample ballots and polling place signs that could be adapted and used by election jurisdictions throughout the country.

EAC engaged Design for Democracy, a non-profit organization affiliated with the American Institute of Graphic Arts (AIGA), to assist with the development of best practices and guidelines for the design of ballots and polling place signs. At its June 14, 2007 public meeting, EAC adopted "Best Practices for Effective Designs in Election Administration." This report includes instructions, guides and suggestions for effective design, as well as sample signs and ballots that can be adapted and used by election administrators. Some examples of those designs follow.



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EAC has distributed this report to election officials and will publish it and the accompanying image library on its Web site in the next few weeks.

Poll Worker Recruitment, Training and Retention

Having an available, trained pool of election workers is critical to the effective and efficient administration of elections. With the average age of poll workers creeping up and the number of returning workers falling each year, EAC helps election officials with recruiting, training and retaining new poll workers. This effort is part of two projects: one focused on traditional poll workers and one specifically aimed at targeting college students as poll workers.

At its July 19, 2007 public meeting, EAC adopted two manuals or guidebooks that can be used by election administrators to recruit, train and retain poll workers: "Successful Practices for Poll Worker Recruitment, Training and Retention" and "A Guidebook for Recruiting College Poll Workers." While both of these documents are aimed to directly assist local election officials with maintaining their poll worker pool, it is also hoped that these guides will be educational tools for State and local governments on the types of resources necessary to recruit, train and retain a cadre of skilled poll workers. Similarly,



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it can serve as a reminder to the public at large of the need for volunteers to serve this very important function.

After final printing, these documents will be available in both electronic and printed form.

The guidebook for recruiting college poll workers will be a terrific addition to the HAVA College Poll Worker Program, a grant program that Congress has funded and which EAC has administered in each Federal election year since 2004. Most recently, in 2006 EAC issued grants to nineteen non-profit and educational institutions for the recruitment and training of college poll workers. A listing of those grantees and the amounts they received follows.

2006 Help America Vote College Program Grant Recipients		
Recipient Organization	Amount of Grant	State
American University	\$16,000	DC
California State University, Long Beach	\$16,992	CA
Citizen Union Foundation (CU) of New York City	\$19,000	NY
Elgin Community College	\$12,000	IL
Hattiesburg Alumnae Chapter of the Delta Sigma Theta	\$10,000	MS
Illinois Central College	\$15,169	IL
Indiana University	\$19,910	IN
Lander University	\$11,000	SC
Maricopa County Community College	\$17,486	AZ
Northern Kentucky University Research Foundation	\$12,000	KY
Project Vote—New Castle County, DE	\$16,875	DE
Project Vote—Saginaw City, MI	\$16,875	MI
Research Foundation of the State University of New York	\$13,678	NY
United Tribes Technical College	\$18,000	ND
University of Baltimore	\$18,996	MD
University of Central Florida	\$15,288	FL
University of Texas El Paso	\$20,000	TX
University of Virginia Center for Politics	\$14,699	VA
Western Connecticut State University	\$16,032	CT



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Election Crimes and Voter Identification

While EAC enjoys a great deal of support from its research and clearinghouse activities, there are inevitably those issues that are so controversial that any report will draw fire from one group or another. EAC has not shied away from these difficult areas of election administration. In late 2006 and early 2007, EAC released studies on Election Crimes and Voter Identification, available at www.eac.gov.

EAC, through contract employees, embarked on establishing a base line for studying what is commonly referred to as voting fraud and voter intimidation. The aim of this study was to survey the available information that had been developed on the topic, develop a common definition of the two phrases, and create a plan for a comprehensive study on the subject matter. The survey of literature, media articles and experts in the field found that there were many different opinions as to the existence, pervasiveness, and types of voting fraud and voter intimidation. It also revealed that there was a very broad understanding of what constitutes "voting fraud" and "voter intimidation." In fact the common understanding was so scattered as to be unworkable for a future, comprehensive study of the topic. As such, EAC chose to focus on "election crimes" and a study of what crimes are reported, investigated, charged, prosecuted and convicted.

Similarly, EAC conducted a review of the voter identification laws and procedures in the various States. The review was conducted by a contractor on behalf of EAC and was focused on the law in place during the 2004 Federal elections. The data available from the 2004 election proved insufficient to deduce how voter identification laws impacted voter turnout. As such, EAC will continue to study the impact of these provisions using data from 2006 and future elections to enhance the information available from 2004.

Future Research and Election Information

EAC has several ongoing projects that are due to be completed prior to the 2008 Presidential election. Two of these research efforts are focused on getting information to voters. The first is a study of Web sites or on-line portals that voters can use to check to see if they are registered to vote and if so where they vote. As a part of its 2005 guidance on statewide databases EAC encouraged States to develop Web-based tools to allow voters to verify their registration. This research effort will follow up by analyzing those sites that are now available and drawing successful practices for making those sites user-friendly and secure. The second project focuses on telephone hotlines that are used by local election officials to respond to voters' election-day questions.

In addition to these projects, EAC is working to complete a study on the use of social security numbers in voter registration. This is one of the required HAVA studies to answer questions related to the use of the last four digits of a person's social security



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number to verify his or her identity. EAC is also conducting a study regarding the benefits and drawbacks involved with the concept of free absentee ballot return. Currently, many voters must place postage on an absentee ballot to return it to the appropriate local election official. The study focuses on whether voters would be more likely to vote absentee if they had the benefit of returning the ballot free of charge.

EAC is also completing a survey and study of the voting practices and experiences of military and overseas citizen voters. This study is expected to identify the current practices of various States in transmitting and receiving these ballots to facilitate and inform the future development of additional electronic means to aid military and overseas citizens with their voting process. Similarly, EAC is completing a study of the vote counting and recounting procedures in the various States. From these EAC will identify best practices that States can consider implementing. Both of these studies will be completed in 2007.

EAC uses the expertise and resources of its Board of Advisors and Standards Board to react to and comment on the various research and study efforts conducted by EAC, whether they are voluntary voting system guidelines or research on areas of election administration. The public can follow along with these Boards' comments as EAC has instituted the use of an on-line meeting forum for each of the Boards. Comments from Board members are posted on-line and can be viewed by any member of the public. In addition, interested persons can email the Board members concerning the various projects and their comments. In addition, minutes of meetings, resolutions, charters, and rosters of membership for each of the Boards can be found on EAC's Web site, www.eac.gov.

EAC: 2007 and Beyond

Much of our efforts over the past few years have been focused on distributing and overseeing nearly \$3 billion in Federal grants to States, for purposes authorized by HAVA. EAC has also developed voting system guidelines, established a testing and certification program, provided for the accreditation of laboratories to conduct those tests, and conducted research required by HAVA. Having completed the majority of our HAVA requirements, it is now time to focus our efforts on maintaining current programs and developing the internal policies and procedures that EAC needs to function smoothly as a Federal government agency. In short, it is time for EAC to shift its focus from outside to inside.

Recent months have brought a great deal of attention to EAC and its work. Some of that attention has revealed weaknesses in our policies and procedures. Our goal at EAC is to shore up those weaknesses by developing strong policies and procedures that will continue to improve our performance and enable us to meet the objectives of HAVA.



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We will continue to honor our responsibilities to the election community and public at large. We recognize that there is much work to be done in the areas of voting system testing and certification, the administration of the National Voter Registration Act, monitoring the use of the more than \$3 billion that has been distributed under HAVA, and in assisting States in their preparations for the 2008 elections. These efforts will constitute our external focus in the months to come.

CONCLUSION

Elections are a complex equation of people, equipment and processes. Like HAVA, EAC works to assist the States in having strong processes that assure that all three work together efficiently and effectively to bring together a successful, accurate election in which the public can have confidence. While EAC has been working tirelessly to bring good practices and more information to the election process, there is still important work to be done. This work takes resources, dedication and focus from this agency. We appreciate Congress' willingness to support EAC's efforts. As the 2008 elections approach, EAC and the election community need the continued support of Congress and all of our stakeholders to assure that our elections run smoothly.

EAC appreciates the opportunity to provide this testimony. If you have any questions, we will be happy to address them.

Ms. LOFGREN. Thank you both very much for that testimony. We will now engage in questions that we may have under the 5-minute rule, and I am going to turn first to our Ranking Member, Mr. McCarthy, for any questions he may have.

Mr. MCCARTHY. I would gladly let you go first.

Ms. LOFGREN. Trying to be bipartisan and gracious here. You want to stop me?

Mr. MCCARTHY. Thank you, Chairwoman. To Chairwoman Davidson, can you explain exactly what kind of research Ms. Wang and Mr. Serebrov were conducted to do for the EAC?

Ms. DAVIDSON. Thank you. The research that was conducted, we asked in the contract for two major things. Definitely it is a very important subject, and we want to make sure that it is addressed right. We asked for a definition of voter fraud and voter intimidation, because they both, if there is a crime, voter intimidation is just as important as voter fraud. So we wanted to make sure that we had a definition that included both of those subjects.

The other thing that we really wanted is a road map of how we proceed forward, because we feel that in getting a determination of what is out there, the data will support whatever is there, because we won't have to make any conclusions. The data will provide that for us. We really feel—and we took their suggestions.

There was a couple, three really, is surveilling the States on to find out how many complaints have been filed, investigated and resolved. Also do the same with election crime units and also law enforcements, because we feel if we have good data from all of those individuals, as I said, the documentation will support any type of problems that is there. We won't have to make any conclusions at the EAC. The data can do that for the report.

Mr. MCCARTHY. Now, there has been some talk out there or discussion about the voter fraud and voter intimidation study being partisan. Knowing your Commission is bipartisan, Republicans and Democrats, how did the Republicans and Democrats vote when it came to adopting the final fraud report? What was the vote?

Ms. DAVIDSON. The fraud report was unanimous, and to issue the fraud report as has been issued, and that you can see; it was a unanimous decision by all three. And it was done at a public meeting in December.

Mr. MCCARTHY. So Republicans and Democrats all voted unanimously for it?

Ms. DAVIDSON. That is correct.

Mr. MCCARTHY. Okay. The EAC has been accused of political motivation when it adopted and issued its fraud report. If you got that same draft delivered by the same consultants today would you vote to accept it?

Ms. DAVIDSON. Absolutely. I would vote to accept the one that we did.

Mr. MCCARTHY. Exactly what you did prior?

Ms. DAVIDSON. That is right.

Mr. MCCARTHY. Okay. Voter fraud is a highly partisan issue. Did you or your staff try to manipulate the Wang or Serebrov studies so they would have a partisan slant?

Ms. DAVIDSON. Absolutely not.

Mr. MCCARTHY. What are some of—you talked of some of the changes you have made. Maybe you can elaborate, because knowing the birth of the EAC and where we have come, and the bipartisanship and continual improvement, what do you think are some of the improvements that you have made that we should focus on?

Ms. DAVIDSON. We are evolving. And since the last reports that you have actually—you know, the controversy in the December report—we have started putting out all of the reports on a virtual Web site to our committees, the Standard Board, and the Advisory Board for them to give comments to. And that is public information. At the same time, anybody can review that. It is put in a register and made aware that—the Federal Register—and made aware that we will be taking comments. So we hopefully are far more transparent.

Our contracts, before they are finalized and the individuals are paid, there are comments made, and our contractors are expected to look at those comments and come back. So we are trying to be far more transparent in the processes we are doing in the future. And as we move forward, obviously we feel that is very important.

Mr. MCCARTHY. Just one last follow-up question. I was told that someone heard Ms. Wang on the radio yesterday, that no one from the EAC contacted her after she submitted her work. According to the contract she signed, was the EAC obligated to get her approval or input before issuing the final report?

Ms. DAVIDSON. You know, I think if my memory serves me correct, there was e-mails between our staff and Ms. Wang on the issue and before the report was issued. I think if you go back and review some of those documentations, you will find that there was conversation there with Ms. Wang on the issue. I don't have that exactly in front of me, but I would be more than willing to provide you those documentations, if you would, like later on.

Mr. MCCARTHY. Thank you very much. Madam Chair, I yield back my time.

Ms. LOFGREN. Thank you. I will proceed at this point under my 5 minutes. I have questions, really, that are procedural about how the Commission conducts its business and the Administrative Procedures Act, and how familiar the commissioners are. It is my understanding under the Administrative Procedures Act that in a case such as the voter fraud and intimidation report, that the administrative agency is not at liberty to rewrite it. They are at liberty to provide information in disagreement to the report that has been contracted. Is that your—how familiar are each of you and the other commissioners with the Administrative Procedures Act?

Ms. DAVIDSON. I can start, and then I will—probably we are—we do rely on our staff a great deal. We rely on our attorneys in the office. Under the Administrative Procedures Act, HAVA does require some of our initial things that we do that we actually, some of our studies, if it is guidelines, that we actually have to go back to our Standards Board and Advisory Board, and that is not in the Administrative Procedures Act. It goes a step beyond.

Ms. LOFGREN. Yes, but in this case that was not within that penumbra.

Ms. DAVIDSON. And we have only done one guideline in our agency. But I would say we always know that we have to put every-

thing in the Federal Register. I think that we are pretty familiar with it, but to be honest with you, I wouldn't say that I am perfect.

Ms. RODRIGUEZ. May I, Madam Chair?

Ms. LOFGREN. Of course.

Ms. RODRIGUEZ. I believe that we would be unanimous when we said that we are not fully embracing all of the things that we should be doing, all of the steps that we should be taking with respect to several layers of Federal regulations.

Ms. LOFGREN. Okay.

Ms. RODRIGUEZ. And I think we are prepared to do that.

Ms. LOFGREN. I think that is good news. I have made some criticisms known, but I mean the point of this hearing is to see how we can improve; correct?

I want to ask a question. I serve on the House Judiciary Committee along with Mr. Davis, and we have been reviewing a great volume of material relative to the Department of Justice and its various activities. And in reviewing from that committee, but also all of the e-mails, it does appear that the Department of Justice took a very strong role in reviewing and editing EAC public reports.

Is it the EAC policy to have Department of Justice officials review, comment on, and exert editorial control over research material and drafts of EAC reports?

Ms. DAVIDSON. The Justice Department is, according to section, I believe it is 214 of HAVA, has two members that serve on our Advisory Board. And so therefore those individuals, as well as advocacy groups, election officials, all give comments to us.

There was a briefing that took place at the—I believe it was a May meeting. And so there was comments taken at that time from everybody. And I, you know, personally, I want you to know that I already met with them twice when I first got here.

I had a meeting with Hans von Spakovsky and Mr. Tanner at lunch with Ray Martinez, and it was when I first was appointed. The second time was a lunch in February, I believe it was, with Mr. Von Spakovsky. So I have not talked with them other than two times. So I really feel there wasn't any pressure at all from their agency. And I would say that just through the committee is the only thing that they had ever done.

Ms. LOFGREN. Well, I just want to say the e-mails certainly show, not your personal participation, but—and I want to make that clear. But there was really—the Department of Justice was playing a very strong role in what ordinarily you would think the commissioners themselves would be approving. And that is one question I had.

I want to let Ms. Rodriguez also answer, because my time is almost up. And I will turn to the other members.

Ms. RODRIGUEZ. I wasn't here then, but—

Ms. LOFGREN. That is okay.

Ms. RODRIGUEZ. But in reviewing the documents, it does seem to me there is quite a bit of interaction. A lot of it is appropriate, because they do serve on our advisory boards. And I would wonder if that is appropriate, because they are also the agency that conducts our enforcement actions. So we, again, it is one of the things we need to talk about seriously within the agency.

Ms. LOFGREN. Okay. I am going to turn now to Mr. Ehlers for his 5 minutes.

Mr. EHLERS. Thank you, Madam Chair. First of all, I wanted to submit my opening statement into the record, as I said earlier.

Ms. LOFGREN. Without objection.

[The statement of Mr. Ehlers follows:]



Opening Statement***[After Lofgren and McCarthy's opening remarks]***

Thank you for the opportunity to provide a few thoughts on this important topic. While I am pleased that we will receive an update today on the progress made by the Election Assistance Commission, I must express my disappointment that the Majority has chosen to deny one of our desired witnesses, Chris Thomas, the Director of Elections from my home state of Michigan, the opportunity to speak to the Committee. As a former local elections administrator I can tell you that listening to election officials such as Mr. Thomas – who is a Democrat, by the way – is essential to gauging the effectiveness of the laws we create here in the vacuum of Washington. While I realize that it is the prerogative of the Majority to limit the Minority to a single witness, it is a shame that we will not have the benefit of Mr. Thomas' insight, or for that matter the insight of *any* state or local election official, in today's proceeding.

That being said, I welcome the witnesses who *were* permitted to testify in today's hearing, and hope that they will be able to provide a clear picture of current and future progress of the Election Assistance Commission toward meeting its



objectives. Established by the Help America Vote Act of 2002, the EAC is a body that is still in its infancy, and thus has experienced some of the growing pains one would expect from a developing institution. While the Commission may be a young organization, it is one with an important mission. Over \$3 billion dollars has been appropriated and distributed to the states to help them comply with HAVA – a significant investment by any standard. HAVA created the EAC to distribute these funds and to provide guidance to the states on methods of compliance. While some of HAVA's provisions were in place for the 2004 election, last year's election was the first in which the states had to comply with all of HAVA's requirements. In particular, several new provisions, including the voting system, disability access and statewide registration system requirements, were in effect for the first time. I would like to hear from our Commissioners in attendance today what they learned from the last election, and how the EAC can improve its assistance to states and localities so that they are prepared for the 2008 election, and beyond.

In addition, a key provision of HAVA, and a directive for the EAC, is the creation of Voluntary Voting System Guidelines. The EAC has stated that these guidelines, which were issued in 2005 and will take effect December 2007, will "significantly increase



security requirements for voting systems and expand access, including opportunities to vote privately and independently, for individuals with disabilities.” I’d like to hear from our Commissioners as to the impact they believe that pending legislation, such as H.R. 811, will have on the adoption of these Guidelines.

Although it has faced some early challenges, the EAC performs an important function in ensuring that HAVA, and ultimately our federal elections system, is successful. The EAC and its commissioners have worked to execute the organization’s mission in a bi-partisan fashion. While the EAC may make missteps as it continues to mature, I am confident that its objectives can, and will, be achieved successfully for the benefit of all Americans.

Mr. EHLERS. I just want to highlight one point on that, in that we had invited one of the top, if not the top election officials in the Nation, here as one of our witnesses. Mr. Chris Thomas of Michigan, highly regarded, has been the head of their agency. And the committee said we are only entitled to one minority witness, which I know is customary in all committees other than this committee, but has not been the custom here.

So I just wanted to protest. He did submit his written testimony, but we have always had the camaraderie, since this is a small committee, to allow the minority extra witnesses. And I am disappointed that was not permitted this time. I just wanted to get it in the record to say that, and the rest can go in the record.

[The statement of Mr. Thomas follows:]

Christopher M. Thomas, Director of Elections, Office of the Michigan Secretary of State and Chair of the EAC Board of Advisors, testimony before the House Committee on House Administration, Elections Subcommittee. Written Testimony submitted August 1, 2007.

I appreciate the opportunity to submit written testimony for the hearing of the Elections Subcommittee concerning the performance of the U.S. Election Assistance Commission. I am the Director of Elections in Michigan, a position I have held since 1981. Prior to joining the Michigan Department of State, I worked with the Clerk of the U. S. House of Representatives and the Federal Election Commission.

I will address a number of EAC programs and the emerging role of the Board of Advisors. The EAC is still in its early infancy as a government agency and is striving to reach its stride being a very small agency in a town of sprawling bureaucracies.

Role of the Board of Advisors

The Board of Advisors is responsible for reviewing EAC products concerning voluntary guidance provided under Title III of the Help America Vote Act (HAVA), Voluntary Voting System Guidelines (VMSG) and various studies required by HAVA. In testimony before the EAC in May of this year, I stated that the members of the Board are very willing to take on a larger role in reviewing EAC studies and guidelines. The EAC recently sought our guidance on a study using a virtual meeting venue on the Internet. This process provided a means for the members to easily communicate their views to the EAC.

It is critical that the EAC use the Board of Advisors and the Standards Board at every available opportunity to provide feedback with respect to its efforts to provide guidance and practices aimed at assisting those involved in the electoral process.

Voluntary Voting System Guidelines

The EAC will place an indelible mark on the future of voting in America with the adoption of the next iteration of the VMSG. The 2005 VMSG was a stopgap effort to close the evident gaps between the 2002 Voluntary Voting System Standards and the newly enacted HAVA requirements. As the release of the next iteration approaches, the EAC has worked closely with the Boards to enhance the review process. First, we will require a longer period of time to digest and comment on the VMSG. Second, we will require additional education as the subject matter is more complex and technical. The EAC is accommodating both of these requests.

Election administrators are interested in the cost implications of any proposed guidelines. There is concern that the cost of future voting systems may substantially increase because of the next iteration of the VMSG. I do not suggest that the guidelines be curtailed to hold costs down, but I do believe a cost benefit analysis is essential to a meaningful review of the proposed VMSG.

Review of Studies Commissioned by the EAC

The Board of Advisors seeks a more active role in reviewing studies commissioned by the EAC. This was discussed with the EAC at its May meeting. As noted above, the EAC is making efforts to create a more accessible review process.

With regard to the Election Crimes study, the Board of Advisors did receive a briefing on the study at the Board's May 2006 meeting. The Board did not review this study prior to its public release in December 2006. At the Board's January 2007 meeting the Board defeated a motion calling on the EAC to release the report submitted by the contractors to the EAC.

After reviewing the material, I have concluded that the EAC was acting responsibly by not releasing portions of the contractors' conclusions that were not supported by the documentation and that were beyond the scope of the contract. In no case should a contractor be allowed to force an agency to publish a conclusion or position that lacks adequate documentation and that is beyond the scope of the contract. The EAC has now released all of the material in question in a manner that makes it clear that they do not agree with the conclusions and that does not include the conclusion in the formal EAC report.

The EAC has acted properly in addressing this critical issue in a methodical manner requiring a series of studies to fully capture the true dimensions of voter fraud and voter intimidation.

My position in support of the EAC on this procedural matter does not reflect my views on the existence or non-existence of voter fraud or voter intimidation.

I further understand that the EAC is reviewing their procedures for granting consulting contracts, managing those contracts and providing substantial peer review of draft reports. The academic community has much to offer the EAC in fulfilling the HAVA requirements to commission various studies. There are other models available to the EAC that will improve the process. It is important that partisan driven ideology not find its way into these studies.

As part of the EAC process, I recommend that the Board of Advisors and the Standards Board be involved in the peer review of all studies.

Accreditation of Voting System Testing Laboratories & Certification of Voting Systems

The EAC and NIST are developing an excellent program to insure that all voting systems are fully compliant with the VVSG and properly tested. I have been a member of the National Association of State Election Directors (NASED) since its inception in 1989.

NASED initiated a program in the 1990s to qualify Independent Testing Authorities and certify voting systems based on the 1990 voluntary voting system standards commissioned by Congress and developed by the Federal Election Commission (FEC). There was no plan to implement the standards once they were promulgated by the FEC. NASED is a non-governmental, non-profit organization with a very small bank operating budget that serves as the vehicle for state election directors to communicate on the issues facing election administration. I offer no apologies for the NASED program as it filled a definite need for more than a decade. There were no voting system failures or sub-par systems put into play during the time the NASED program was in operation.

In 2001 members of Congress, in particular Congressman Vern Ehlers, saw the need to expand the NASED program and bring far more substantial resources to the critical need of certifying voting systems. Under HAVA the elections community is very fortunate to have NIST involved in the creation of guidelines and the accreditation of laboratories.

The EAC has launched its programs implementing the HAVA requirements to accredit laboratories and certify voting systems. These programs combined with the next iteration of the VVSG will provide the assurances that our voting systems are accurate, secure and properly configured.

Voluntary Guidance

The EAC has taken steps to provide voluntary guidance to election administrators in a variety of areas. Most important are the Management Guidelines that will supplement the VVSG. Once the voting systems are certified and placed into the election process, their operation becomes the critical factor. Through the Management Guidelines election officials and those involved in the election process will receive beneficial information on the operation of the equipment.

In addition, the Quick Start Guides, the Ballot and Polling Place Sign Designs, the Spanish-English Glossary and the Poll Worker Recruitment, Training and Retention Manuals are assisting election officials in critical areas.

Thank you for the opportunity to express my views on a number of the operations of the U.S. Election Assistance Commission.

Mr. EHLERS. I appreciate the EAC. I think it is one of the better things we did. I would in some instances wish you had more authority in terms of getting HAVA working right. And I know when we put this together a few years ago it was such an intricate and delicate dance between all the parties, the local elected officials, State elected officials, manufacturers, users, every county, city clerk in the Nation. I think we came out with a decent product. But I wish we had—well, actually I tried to do it at the time, I just was outvoted, but we should have done a much better job of establishing standards first, giving everyone a chance to be involved in that, and then giving the manufacturers a chance to really meet the standards. I think we could have avoided most of the difficulties that have developed, and I wish the EAC, and I know the other advisory groups, had been able to play a better role in that. That is water over the dam. I think things are beginning to work smoothly now, and I appreciate that.

I am concerned about the reports that were referred to. From everything I hear, that it was appropriate for you not to put your stamp on them. And I guess in the next panel we will have time to get into more detail on that. But since you are a new agency, I urge you to exercise extreme caution, foresight, and thoughtfulness in how you approach these issues.

I don't know the details of how the report was ordered, how it was structured, how it was supervised. But from everything I have heard, it is a very poor sample of a report. And I just want to give each of you an opportunity to respond to my impressions. If I am wrong, let me know. If I am right, I would appreciate affirmation.

Ms. DAVIDSON. I can start. You know, I believe there was a lot of good things in the report. It gave us a road map as to what we really, really want to go forward. We just felt like when interviews of 24 individuals that was taken, that that wasn't enough to make a determination and put that into place. In my opinion, you have got to really do a deep study before you can make a statement of whether there is voter fraud or voter intimidation; and whether 24 people, we felt was just not enough to place our findings on and make a determination on.

But there are good things. There is a way to move forward. And we think that is very important is how we move forward. So as I said earlier, the data stands for itself. And that is what we wanted to do. We feel that voter intimidation, anything that is a crime, voter intimidation, voter fraud, definitely needs to be reviewed, because we need to make people aware of what the problems are, and Congress, own States, everything. I think it is for the best the Democrats, the Republicans, the voters, that they feel that there is confidence and that their vote is counted and they are not intimidated from the polls.

So I really think that as we move forward we will see a great deal more. But 24 people is not enough to make a determination on is our feeling.

Mr. EHLERS. Well, you need more than that. Also I am curious whether any Members of Congress were asked to recommend individuals who should be interviewed or if any Members of Congress were asked to submit samples or information about dishonest election practices that they were aware of in their community, their

State, et cetera, because most of us have been contacted quite a bit and can give examples.

Ms. DAVIDSON. I don't believe they were, but in the future, obviously, as we move forward, knowing that Congress is interested, as well as election officials, maybe that is another area we should add to our survey is to see how Congress Members—because in reading the Chairwoman's comments, obviously she is very concerned about in her area of issues. And so obviously the more input we have from everybody, the better off we are.

Ms. LOFGREN. The gentleman's time has expired. I would turn now to the gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Madam Chair, and welcome to Chairwoman Davidson and Vice Chairwoman Rodriguez. And I appreciate the meeting that we had in my office a month or two ago. Time really does fly when you are having so much fun.

But I do have a couple questions. The first one is to the Chairwoman. You indicated that Mr. Spakovsky from DOJ is a member of an advisory committee of sorts. Is that right?

Ms. DAVIDSON. He was at the time that he was with the Justice Department. He no longer is serving there.

Mr. GONZALEZ. But I am talking the time in question here. How many members of this Advisory Committee or Board do you have?

Ms. DAVIDSON. There is—I was going to say 48, but 47.

Mr. GONZALEZ. And how many submitted comments or had some input in the nature that Mr. Spakovsky had regarding voter fraud allegations and the necessity to maybe readdress it in the draft report?

Ms. DAVIDSON. There was even a resolution that was done at that May meeting concerning the issues. All of the commissioners were present at that meeting, and people came up to us individually. Submitted in writing, I don't know how many submitted anything in writing.

We also had an Advisory Board meeting in February, and there was discussion about the report at that time, and a resolution was proposed to make the report open. This was after our fraud report was adopted, and then they wanted to make the initial report—

Mr. GONZALEZ. I think I am trying to get at, at that point in time who was the most active member of this particular Advisory Committee that communicated with you to a greater degree than anyone else, whether it was by e-mail, letter, discussions? Would it have been Mr. Spakovsky? I always mess up his name, but I am somewhat familiar with him. I remember him in the Department of Justice and some of the experiences the Texas delegation had.

Ms. DAVIDSON. Personally, the election officials are the ones that I talked to more than anybody else.

Mr. GONZALEZ. In January 2007, and while he was serving, it says here—this is an article by Jerry Ebert—one final note that is set forth in the EAC documents, while serving at the FEC, von Spakovsky wrote an e-mail to Commissioner Donetta Davidson in January 2007, enclosing documents that she might be able to use on voter ID. One was an article that he wrote for the Federalist Society, entitled "Increasing the Security of Elections: The Effect of Identification Requirements on Turnout of Minority Voters."

On the first page of the article he wrote, quote, "Voter fraud is well documented and existing in the United States." In the next paragraph he writes, "Investigations in Milwaukee, Wisconsin, found thousands of fraudulent and suspicious votes in that city in a State where John Kerry won by only 11,394 votes in the 2004 election," end quote.

And who among the authorities cited by von Spakovsky for those two statements? His own law journal article that he published under the name Publius. That is why we are so suspicious of the process.

I also would remind individuals that it wasn't that long ago, in the spring, when all these allegations were coming up in the context of the firings of the United States Attorneys General. One of those that received some complaints, obviously was not removed, disciplined or whatever, was the U.S. Attorney from Milwaukee. And this individual went on record and basically says that he played down the voter fraud complaints, saying that he and a local Democratic prosecutor joined in investigating such allegations, and he says we tried to address it in a serious and detailed way, but in a way that did not impact any election. I think we did that. It has been addressed.

I am just saying that it seems like this individual had an inordinate amount of contact with the Commission, had an inordinate amount of influence in the final draft. And it definitely was redrafted. I mean there is no doubt. I think we have been able to compare final draft versus the draft language when it came to voter fraud. That is our concern. I mean the whole debate over the firings of those attorneys general really does revolve around a particular subject, and that is voter fraud. So we see this rearing its head in every venue. And we just don't want it to impact what your work should be.

And one last aspect of voter fraud. I always thought of this of people that shouldn't be voting. Do you have anything that might gauge the number of multiple voting registrants, people that may be registered in more than one State and get to vote in both States? Because I think we had something recently.

Ms. LOFGREN. The gentleman's time has expired, and by unanimous consent an additional 30 seconds is granted.

Mr. GONZALEZ. Just to respond. I am just curious about that.

Ms. DAVIDSON. I do not have any data. I can tell you it would take research to get you that. But on the other hand, back to the conversations with Mr. von Spakovsky, definitely, as you see, we adopted the voter fraud in December. Those were given to me in February of this last year. It was after. But at the end of the day, no matter who said what to me or gave me any type of documentation, I make my own decisions. I firmly want to state that and make it very clear. I make my decisions at the end of the day. Right, wrong, indifferent, nobody has that control.

Mr. GONZALEZ. Thank you very much.

Ms. LOFGREN. The gentleman from Alabama, Mr. Davis.

Mr. DAVIS of Alabama. Thank you, Madam Chairwoman. Ms. Davidson, let me perhaps put in context for you some of the frustration that my friend from Texas just displayed, because I feel a lot of it too. Ms. Lofgren mentioned that she and I—the Chairwoman

mentioned that she and I serve on the Judiciary Committee together. And at this point there is a very familiar feel to some of the newspaper articles that I read in preparing for today's hearing. There is a very familiar feel as I listen to some of these questions. The Chairwoman and I have gone through several months now of hearings in committee about U.S. Attorneys who were pressured, I think that is the best word, "pressured" to bring voter fraud cases against Democratic voting activists.

The Chairwoman and I have heard testimony about the former U.S. Attorney in part of Missouri, Mr. Graves, who was apparently terminated because he was not zealous enough or aggressive enough in bringing voter fraud cases against activists associated with the Democratic Party.

We have heard testimony about the former U.S. Attorney in Seattle, Washington, who at one point was such a rising star he was offered a Federal district judgeship, but who was terminated because he wasn't aggressive enough in bringing voter fraud cases against Democratic activists.

I will put it in context of another matter Mr. Gonzalez is very familiar with: the controversy over the redistricting, the very unusual mid-decade redistricting of the congressional lines in Texas. A redistricting by the admission of all parties involved occurred because some felt there weren't enough Republicans in Congress from Texas.

Career lawyers of the Department of Justice reached a conclusion that there were enormous problems under the Voting Rights Act with the redistricting. Political appointees, possibly including this individual, Mr. von Spakovsky, disagreed with the judgment of the career lawyers, superimposed their own opinion.

I am from Alabama, next to Georgia. Georgia passed a draconian voter ID law, one of the most draconian and most limiting voter ID laws in the country. My State allows 22 forms of voter. ID Georgia allowed three, and required people pay some kind of a fee to get an ID if they didn't have one.

Career lawyers at the Department of Justice looked at those requirements, felt that they were violative of the Voting Rights Act. Political appointees at the Department of Justice reached a different conclusion.

So when you weave all of these things together, and I certainly accept your good faith and appreciate the good work that you do, but when you weave all those events together you have a pattern of a very aggressive ideological administration that has a particular mindset about voter fraud. And that would be okay if it was the political arm of the White House, in my opinion.

You know, if it was the Office of Political Affairs or the RNC, I would just take that as one of the many disagreements we have. But when it is the Department of Justice, that is bothersome to me.

And one other contextual point you should be aware of. Same committee the Chairwoman and I serve on, Judiciary, had an oversight hearing involving the civil rights division at the Department of Justice. The chief deputy to the civil rights chief testified, and I asked her, how many voter intimidation cases have been brought

by the Department of Justice in the last 6 years? And her answer was she did not know of a single one.

Now, we can quibble about the accuracy of any survey or the methodology of any survey that was employed. I don't think that any serious person in this room or any other room would assert that there has been no instance of voter intimidation in the United States in the last 6 years, or that there have been no credible allegations of voter intimidation made to the Department of Justice.

So what I would, I suppose, ask you to comment on is the fact that for whatever reason voter intimidation, efforts to prevent people from exercising the right to vote does not seem to be a particular priority. And second of all—of the Department of Justice.

And second of all, can you comment on the fact that voter fraud appears to be something of a political weapon in the hands of this administration?

Ms. DAVIDSON. I will try to go back to the experience that I have from the State of Colorado. I will tell you any type of voter crime is hard to get a conviction on. Doesn't matter what kind. When we take it to the district attorneys in the State of Colorado, whether it was even a voter registration voter crime, people voting more than once, somebody at the intimidation, whatever the efforts were, they always told us that they were far too busy with crimes of murders and issues like that to take on voter registration or voter—voting twice or intimidation.

Mr. DAVIS of Alabama. Let me stop you on that point, though. I understand your experience in Colorado, but frankly the experience of a number of these U.S. Attorneys is that the Department of Justice was very interested in cases around voter fraud, that they made it a priority. In fact, the Attorney General has testified to our Judiciary Committee that these cases, however you and I may rank them on the scale, were extremely important.

There was not that same sensitivity around voter intimidation. There appears to be a very high, I would submit, unwarranted level of engagement on the part of the Department of Justice around voter fraud issues. And that, Ms. Chairwoman, if I am allowed 10 seconds, I would say that leads to my conclusion that voter fraud appears to be to some in this administration a political weapon instead of a legitimate assessment of whether elements of a crime have been committed.

Ms. LOFGREN. The gentleman's time has expired. And we have actually, each one of us had our chance to ask our questions or make our statements. So we will thank you again for being here. And if we have any additional questions we will keep the record open so any member, through the Chair, can provide questions to you. And we would ask that they be responded to as promptly as possible. We will now ask our second—yes.

Ms. DAVIDSON. May I ask also can we submit additional information to you at any time?

Ms. LOFGREN. Of course. We will keep the record, under the rules, open for 5 days.

Ms. DAVIDSON. Okay.

Ms. LOFGREN. So please get whatever information you wish us to see, if you can, within that time frame.

Ms. DAVIDSON. Thank you.

Ms. LOFGREN. We will call our next panel forward if we could, please. Let me introduce our three panelists. First we have Jon Greenbaum, the director of the Voting Rights Project for the Lawyers' Committee for Civil Rights Under Law. Prior to joining the Lawyers' Committee, Mr. Greenbaum was a trial attorney in the voting section of the United States Department of Justice for 7 years, as well as a litigation associate in the Los Angeles office of the international law firm Dewey Ballantine. Mr. Greenbaum graduated in 1989 from the University of California at Berkeley, with a bachelor of arts degree in legal studies and history, and he received his law degree from the University of California at Los Angeles in 1993.

We have Professor David Super, who is a professor of administrative law from the University of Maryland School of Law. Prior to teaching at the University of Maryland, Mr. Super taught administrative law as a visiting professor at Washington & Lee University, as well as Yale Law School. In addition, he taught administrative law as a visiting lecturer or adjunct professor at Columbia Law School, Georgetown University Law Center, Howard University Law School, and the University of Pennsylvania Law School, and Princeton University. Professor Super graduated from Princeton University magna cum laude in 1980, and in 1983 graduated from Harvard Law School.

And finally, we have Professor Robert Montjoy. Dr. Robert Montjoy teaches political science at the University of New Orleans. He specializes in electoral policy and administration, and frequently his academic research appears in books and in a variety of journals, including Public Administration Review, Policy Studies Review, Publius, and Public Opinion Quarterly. Dr. Montjoy also is a current member of the board of directors of the Elections Center, the largest organization of election officials in the United States, and a past member of the National Advisory Board for the Manufacturing Extension Partnership Program of the National Institute of Standards and Technology.

We welcome the three of you. We, as with our prior panel, we ask that you summarize your written testimony in 5 minutes. Your full statement will be part of the official record.

STATEMENTS OF JON GREENBAUM, VOTING RIGHTS PROJECT DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; DAVID SUPER, PROFESSOR OF LAW, UNIVERSITY OF MARYLAND SCHOOL OF LAW; AND ROBERT MONTJOY, PROFESSOR, UNIVERSITY OF NEW ORLEANS

Ms. LOFGREN. And I would turn first to Mr. Greenbaum for your statement.

STATEMENT OF JON GREENBAUM

Mr. GREENBAUM. I want to begin by thanking Chair Lofgren, Ranking Member McCarthy, and the members of the Subcommittee on Elections for convening this oversight hearing of the United States Election Assistance Commission, and inviting myself and others to testify.

As we have been reminded over the past several months, congressional oversight can serve an important role by exposing facts

about government practices, and can serve as a catalyst for changing those practices when they need to be changed. I hope and expect that today's hearing will have this impact.

My organization, the Lawyers' Committee for Civil Rights Under Law, has been at the forefront of protecting and enhancing the right to vote since President John Kennedy and Attorney General Robert Kennedy convened the meeting of lawyers that led to our creation in 1963.

Consistent with our work, we have participated in and closely observed the EAC since it began operating in December of 2003. My executive director, Barbara Arnwine, serves on the EAC board of advisors, and I participated on the working group for the voter fraud and intimidation study that I will discuss below.

The EAC has in large measure failed to fill its core mission to protect voters' rights. Our greatest concerns about the EAC are its lack of transparency and standards for making decisions and its failure to accept the analyses of expert consultants it has hired at taxpayer dollars when those analyses clash with the views of some EAC commissioners and staff. These issues have undermined the credibility of the EAC in the eyes of many.

Because the EAC is a relatively new and small agency, we hope that this hearing, other ongoing congressional inquiries, and internal and external scrutiny will have the effect of transforming the EAC into an effective agency whose work is respected.

Two dramatic examples of how the EAC has failed the American people are its handling of the voter intimidation and fraud study, and the voter identification study. As part of the Help America Vote Act, Congress required the EAC to commission these studies. For both studies, the EAC chose and hired consultants to perform the studies, and the consultants provided their work to the EAC in the summer of 2006. Even though the studies contained facts pertinent to the debate in the House of Representatives last fall over whether photo identification for voters should be required for Federal elections, namely, the studies showed there is little evidence of polling-place fraud by voters, and that voter identification disproportionately affects certain racial and ethnic groups. The EAC was silent about these studies for several months afterward.

With respect to the voter intimidation and voter fraud study, EAC staff materially changed the study without the input of the consultants, and only released the consultants' draft after months of criticism.

With respect to the voter identification study, the EAC voted not to adopt a study that cost taxpayers more than half a million dollars. I was particularly disappointed about the voter intimidation and voter fraud study because of my involvement. For that study, the EAC chose two consultants, one with a conservative background, one with a liberal background, to ensure balance. In consultation with the EAC's research director, the consultants sought to do a comprehensive review of the case law and literature on the subject, and interviewed more than 20 mutually agreed-upon voting experts. Both consultants participated in all interviews. The consultants summarized the results of their research and provided that summary, as well as all of the research, to a mutually agreed-upon and undeniably balanced working group.

The working group met in May 2006, and we discussed the consultants' research and analysis, as well as suggested avenues of research for future studies on the subject. One of the key facts the consultants determined, based on all their research, was that there was little evidence of voter fraud at the polling place. Only one member of the working group, Indiana Secretary of State Todd Rokita, whose State had enacted a government-issued photo identification law for voters the year before, had a serious objection to that finding. And he was not able to provide evidence backing his position.

When the EAC issued the final study in December 2006, I was shocked to see that the study had now concluded that there is a great deal of debate on the pervasiveness of fraud in elections, as well as what constitutes the most common acts of fraud or intimidation. E-mails have revealed that consultants submitted their version in July 2006, and without any input from the consultants, EAC staff essentially rewrote the study, materially changed in several respects that I can discuss in response to questions. E-mails have also revealed that during the time of the rewrite, EAC staff agreed to permit political appointees and career staff of the Department of Justice to review and comment on the rewrite.

The right to vote is our most fundamental right, as it is preservative of all rights. By failing to conduct its business in a clear and open manner, and undermining the analysis of experts it has hired with taxpayer dollars because it disagrees with their conclusions, the EAC has failed in its mandate as a governmental agency to protect that fundamental right.

Despite the failure to live up to the promise that Congress envisioned for the EAC, there is time to turn the EAC around and put it to work on behalf of all eligible American voters. I look forward to providing you with any assistance I can to help achieve that.

Ms. LOFGREN. Thank you very much for that testimony.

[The statement of Mr. Greenbaum follows:]



STATEMENT OF JON GREENBAUM, DIRECTOR, VOTING RIGHTS PROJECT,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, BEFORE THE
HOUSE ADMINISTRATION COMMITTEE.

August 2, 2007

Thank you Madame Chairman. I want to thank you and the other members of the committee for having me here to share the experience that I and my colleagues at the Lawyers' Committee for Civil Rights Under Law have had working with the United States Election Assistance Commission ("EAC"). The Lawyers' Committee was founded in 1963 by President John F. Kennedy and his brother Attorney General Robert Kennedy to involve the private bar in protecting our nation's civil rights. For over 40 years, the cornerstone of this commitment has been ensuring that all eligible Americans have a meaningful opportunity to participate in our democratic process. For more than four decades, the Lawyers' Committee has committed itself to protecting the most fundamental right – the right to vote.

The Lawyers' Committee has been intimately involved with the EAC since its formation shortly before the 2004 election. Barbara R. Arnwine, the Lawyers' Committee's Executive Director, sits on the Commission's Board of Advisors and I served on the working group for the EAC's study on voter fraud and voter intimidation. Moreover, in our position as a leader on policy, litigation and coalition building concerning the administration of elections, the Lawyers' Committee has closely tracked the successes and failures of the EAC. Unfortunately, since its uncertain start, the EAC has, in large measure, failed to fulfill its core mission to protect voters' rights. When the Help America Vote Act was passed, we applauded the creation of the EAC and we still believe in its core purpose and its ability to fulfill the vision that Congress intended. By building transparency and oversight into the EAC process and by requiring the EAC to be more open in its conduct, the EAC can fulfill its essential duty to the American Electorate. I thank this committee for beginning that process through the oversight you have already conducted and through this hearing. We are committed to working with Congress and the EAC to get the Commission back on track.

HISTORY OF THE ELECTION ASSISTANCE COMMISSION

After the election process imploded in 2000 and the outcome of the election was taken out of the hands of the electorate, the Congress attempted to address the problems that forced the country to the brink of a constitutional crisis. It soon became clear that the conditions that caused the Florida election debacle was decades of neglect, inadequate

resources and unproductive decentralization in our nation's election system. What was more disturbing was that Florida was just the state with the perfect storm, but the elements for a repeat disaster were present across the country. The system of elections was not breaking, it was broken.

Advocates across the country heralded the bi-partisan efforts to address the problems that prevent countless eligible Americans from effectively exercising their right to vote. For years, efforts at real, substantive election reform were frustrated by the partisan interests of legislators. The 2000 election was shocking enough to demand action. While the final version of the Help America Vote Act suffered from the relative youth of election reform as a substantive policy issue, the unintended consequences of which we are beginning to identify through the bill's gradual implementation, one bright spot was the establishment of the Election Assistance Commission.

Through the Lawyers' Committee's role as lead legal partner of Election Protection, administrator of the coalition's non-partisan voter services hotline – 1-866-OUR-VOTE, and our historic commitment to overcoming the barriers to the polling place, we have identified three primary sources of election problems that have the potential to cause the meltdowns that have become a part of the political lexicon in recent elections: (1) the decentralization and inconsistency of election administration resulting in grossly inadequate and unequal experiences for voters; (2) persistent insufficient resources for the infrastructure of our elections; and (3) deliberate attempts to remove eligible voters from the process to accomplish either cynically partisan or shamefully discriminatory ends. The establishment of the EAC was critical because, by design, it would continue to identify the systemic issues confronting election administration and respond by providing appropriate apolitical, uniform guidance to the states and tens of thousands of local election officials. Furthermore, it would administer an historic federal financial commitment to the wellness of our elections. Finally, the Commission would investigate and report on the malfeasance, systemic challenges, and deliberate manipulation of the election process. Most fundamental, however, it would do these essential tasks without regard to partisan affiliation.

Unfortunately, the EAC lost its footing right out of the gate. Despite a presidential election on the horizon, the Commission was not funded by Congress until just a few months before ballots began to be counted in 2004. Instead of setting up transparent, professional procedures for conducting business, the EAC embarked on a haphazard course of unaccountability. Those of us who have tracked the EAC's performance since its inception cannot discern any reliable or professional process for making decisions.

The lack of transparency and professionalism in the EAC has given rise to legitimate questions about its independence, non-partisanship, and competence to serve its role in protecting the franchise. The most glaring example of the continuing problems is the recent scandals regarding the EAC's research and reporting. One of the EAC's statutory charges that most excited voting rights advocates was the development of unbiased, honest research and analysis of election administration and the obstacles voters face as they head to the polls.

VOTER FRAUD/VOTER INTIMIDATION AND VOTER IDENTIFICATION REPORTS

Section 241 of HAVA requires that the EAC “[o]n such periodic basis as the Commission may determine, the Commission shall conduct and *make available to the public* studies regarding . . . election administration issues. . . .” (emphasis added). The statute goes on to enumerate more than a dozen specific studies with which the EAC is tasked. While many of these studies have yet to be completed, two – the voter fraud/voter intimidation study and the study on the impact of voter identification – illustrate how, and the reasons why, the EAC has failed to live up to its statutory promise.

As I mentioned, I served on the working group for the EAC’s research on the impact that voter fraud and voter intimidation play in the electoral process. I was honored to be asked to serve and excited by the opportunity to help inform the conclusions of the expert researchers as they endeavored to uncover the role that these insidious realities play in our election system. While I was exposed to much of the laudable work of the consultants engaged by the EAC, the country was not.

While HAVA requires that the EAC undertake a series of reports related to elections, this report and another on the impact of voter identification on voter turnout stand out because voter fraud has been the primary rationale for the partisan-driven national campaign to impose unnecessary and discriminatory voter identification in jurisdictions across the country. Opponents of identification provisions have pointed to their disproportionate impact on traditionally disenfranchised voters. The research submitted by the consultants on both reports found that there was no evidence for the thesis that rampant voter impersonation or other voter fraud at the polls is corrupting our electoral process and that voter identification had a negative impact on voter turnout, particularly among minority voters. The EAC, however, refused to release these reports during a critical period in the ongoing debate over the efficacy of voter identification requirements.

As a result of this committee’s oversight, Freedom of Information Act Requests made by advocates such as the Brennan Center for Justice and scrutiny by the media, thousands of pages of documents have been released and begin to uncover who was responsible for the suppression of these reports. Unfortunately, some of the players in the unfolding national scandal at the Department of Justice – where our nation’s law enforcement priorities were placed on the back burner while partisan pursuits were prioritized – seemed to have weighed in on this process as well. The e-mails released by the EAC demonstrate that DOJ officials tried to influence who worked on the reports and the substance of Voter Fraud and Intimidation Report.

Hans von Spakovsky, who has come under fire for playing politics with voters’ rights while a political appointee in the Justice Department and is currently seeking a seat on the Federal Election Commission, tried to influence who worked on both reports. While at DOJ, von Spakovsky inserted himself as the liaison between the Department and the EAC, despite the HAVA provision reserving that position for the chief of the Voting

Section. In that role he attempted to influence who worked on these reports. Mr. von Spakovsky sent emails attempting to remove Tova Wang of the Century Foundation from the voter intimidation/voter fraud report and Dan Tokaji of Moritz College of Law from the voter identification report. Additional e-mails show that the EAC agreed to provide other DOJ officials, including Mr. von Spakovsky's successor, drafts of the voter intimidation/voter fraud report for their review and comment, including drafts rewritten by EAC staff that were not shared with the consultants who had contracted to draft the report.

The EAC retained Tova Wang, a fellow at the Century Foundation and Job Serebrov, an attorney from Arkansas, to prepare the voter intimidation/voter fraud study. The Commission picked these two consultants because they represented the political spectrum of thinking on this issue with Wang traditionally taking a more liberal position on election issues and Serebrov more often coming down on the conservative side. In mid-July 2006 the consultants submitted their report to the EAC, which took no immediate action. In mid-October, amidst questions from advocacy groups and a demand from Barbara Arnwine, in her capacity as a member of the EAC Board of Advisors, that the Commission release the report, *USA Today* published a story relying on a leaked interim report which suggested that the consultants came to the conclusion that there is little polling place fraud, but there continues to be legitimate concerns that structural barriers and voter intimidation play a significant role in the election process.

The article led to increased demands that the report be released, especially considering the country was once again on the heels of a federal election where voter fraud was being used as the rationale to fight an injunction against the photo identification and proof of citizenship law in Arizona, develop voter challenge programs in various states (some which happened and some which were just threatened) and legitimize other behavior that had the potential to disenfranchise voters before election day. The EAC, however, refused to release anything regarding the report until December 7, 2006. During the intervening 5 months, the consultants were told that the EAC was revising their report, but they were not consulted on how the report would be changed, nor were they provided with an advance copy of the EAC's final draft, nor were the Board of Advisors kept in the loop, despite the mandate of Section 247 of HAVA that they be involved in the reporting process. Instead of releasing the report prepared by the consultants, the EAC released a report authored by the Commission's staff that often contradicted the conclusions reached by the consultants. The report, called *Election Crimes: an Initial Review and Recommendations for Future Study*, did not acknowledge any of the conclusions of the report submitted by the consultants.¹ While HAVA requires the EAC to study both voter fraud and voter intimidation, Congress did not consider "election crimes" a critical area of study. Moreover, the EAC mischaracterized the evidence collected by the consultants by suggesting that the debate over the prevalence of voter fraud and its impact on elections was weighed evenly on both sides. The released report

¹ For more detail on the differences between the report as released and the report as submitted, see, *Panel Said to Alter Finding on Voter Fraud*, Ian Urbina, New York Times, April 11, 2007, A01. The report as submitted is available at http://ccr.3cdn.net/dc4d9842828c28586e_t6m62ikb3.pdf and the final report is available at <http://eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20POSTED.pdf>.

also played down the impact that structural disenfranchisement and continued voter intimidation have on election outcomes. Additionally, the submitted report made a number of recommendations for future study based on the input from accomplished social scientists, but these recommendations were omitted in the released report.

To me, this was quite surprising. As a member of the working group, I expected the EAC's report to reflect what I was provided before the working group convened in May 2006. The working group was made up of leaders and thinkers on election issues – from academics, to activists, to attorneys, to elected officials – from across the ideological and political spectrum. Prior to our meeting, we received a draft of the report. When we met, there was vigorous discussion exposing the ideological and political diversity in the room, but for the most part, we agreed that the report's essential conclusions were accurate. We then developed near unanimous recommendations on how the course of research in this field should proceed. There was a single dissent over the usefulness of this study by Indiana Secretary of State Todd Rokita. Apart from the rest of us, he developed a separate set of recommendations for study that concentrated on election fraud. It was disappointing, then, to see that Mr. Rokita's ideas wound up as a dominant theme in the final report released by the Election Assistance Commission. It seems troubling that the recommendations of a single elected official – who was concurrently leading the defense of one of the most restrictive voter identification regimes in the nation -- trumped the collective wisdom of the rest of the group. Equally insulting was that I was not given an opportunity to comment on the changes to the report. In fact, the first time I saw what was done to the report was when it was publicly released.

Again, groups demanded that the original report be released. During the EAC's Board of Advisors meeting in January, Ms. Arnwine proposed a resolution, which failed, demanding release of the original report. The consultants have been asked repeatedly to describe their findings and experience by the media; however, until Congressional and media pressure was too much to bear, the EAC contractually gagged them from discussing any of the conclusions of their research.

The report on voter ID was recently released as well after calls from Representatives Maurice Hinchey and Jose Serrano. Since the ID consultants' contract did not have the same confidentiality agreement, the consultants have spoken a bit more candidly about its contents. According to testimony delivered to the EAC on February 8, 2007, the ID report acknowledges that there is evidence that identification requirements have a negative impact on voter turnout and that they have a disproportionate impact on certain minority voters. Like the fraud/intimidation report, the EAC refused to endorse the findings of the ID report claiming methodological flaws. According to the consultants however: "The statistical analysis suggests that stricter voter ID requirements can be associated with lower turnout Without a better understanding of the incidence of vote fraud and its relationship to voter ID, for now best practice for the states may be to limit requirements for voter identification to the minimum needed to prevent duplicate registration and ensure eligibility."²

² *Presentation to the U.S. Election Assistance Commission: Summarizing a Report on Best Practices to Improve Voter Identification Requirement HELP AMERICA VOTE ACT OF 2002 Public Law 107-252*

During the time when the EAC refused to release the reports, Congress was debating a number of proposals to impose an ID and proof of citizenship requirement on voters across the country. The rhetorical foundation that propelled one of these proposals to passage on the House floor (and in many state legislatures) was the prevalence of voter fraud.

It took threats of subpoenas from Congress and exposure on the front page of the *New York Times* for the story of these reports to come out. These reports, paid for with taxpayer dollars and designed to improve the electoral process for all Americans, regardless of partisan affiliation or ideological commitment, should have been done through a much more transparent process.

RECOMMENDATIONS

To improve the reporting process in the future the EAC should:

- Make all research it commissions available without unreasonable delay;
- Serve its statutory clearinghouse role by releasing the research it commissions without censoring the conclusions;
- Select consultants on their ability to accomplish the task, as opposed to their political or ideological views;
- Allow researchers to conduct their research unencumbered by the EAC's bureaucracy. While the EAC must oversee the contracting process, it should not place unreasonable restrictions on researchers or prevent them from drawing conclusions;
- Not contractually prevent researchers from publicly discussing their research;
- Encourage sound social science research practices, such as peer review and academic independence;
- Publish uniform rules and policies for selecting research contracts and adhere to those standards;
- Seek public input on its research agenda. If it disagrees with the conclusions or the methodology of a research project, the EAC should be required to detail the reasons why it finds the research flawed and it should only refuse to adopt research after a properly noticed public hearing and a formal vote.
- Regularly keep the Board of Advisors updated on the progress of research as required by Section 247 of HAVA. The Board of Advisors should be permitted to audit the progress of any research assignment.

The EAC's need for transparency and professionalism is not confined to the research it conducts. When the Commission recently released emails concerning a host of questionable decisions by the EAC, they revealed a course of ostensibly public business

Submitted on June 28, 2006 by The Eagleton Institute of Politics, Rutgers, The State University of New Jersey and The Moritz College of Law, The Ohio State University. Thomas O'Neill and Tim Vercellotti, Testimony to EAC, February 8, 2007.

conducted in a very private way. From small decisions to large decisions, it seems that EAC policy is often set either through unrecorded tally votes or by staff fiat. Instead:

- The EAC should be required to conduct substantive decision making in public, unless it can establish a reasonable and convincing reason for private deliberations.
- While staff should have the ability to keep the Commission running through modest and perfunctory executive decisions, substantive EAC business should be done in the open, through recorded votes and public dialogue.
- The Commission should encourage citizen input and should make decisions through open dialogue and recorded votes.

Finally, increased transparency and professionalism should quell what seems to be increased politicization at the EAC. As I discussed above, partisan policy positions – over emphasizing the degree of polling place voter fraud while under playing the degree of voter intimidation and discounting evidence of the discriminatory impact of identification procedures – trumped social science research in the conclusions reached by the Commission on critical research assignments. Moreover, the recent appointment to the EAC of a partisan election attorney with no election administration experience further call into question the EAC's commitment to non-partisanship. Though partisans recommend appointments to the EAC and the appointments are made by the President with the advice and consent of the Senate, for the short history of the EAC most of the Commissioners had been professional election administrators or had worked on nonpartisan election efforts. That tradition should continue.

Despite the failure to live up to the promise that Congress envisioned for the EAC, there is time to turn the EAC around and put it to work on behalf of all eligible American voters. I do, however, caution this committee from looking elsewhere for the solutions that the EAC was designed to accomplish. While the EAC needs to professionalize in order to be effective as an agency, it is a worthwhile experiment that, with some key reforms, can be an integral part of improving election administration across the country. After these necessary reforms are implemented, either by the Commission itself or by the Congress, the EAC should receive vigorous support. I have attached several materials to this statement that are relevant to these issues. Thank you for the opportunity to come before you and I look forward to answering your questions.

STATEMENT OF DAVID SUPER

Mr. SUPER. Thank you very much, Chairman Lofgren, Representative McCarthy, and members of the subcommittee. As you noted, I teach administrative law, and that will be the focus of my comments.

As an administrative law professor, I study many administrative agencies, and as a new agency I think the EAC can learn a great deal from other agencies' experience, in particular as an agency that is new, that does not have an established record or reputation, and one that is dealing with some of the most sensitive and partisan, as well as most important issues before the country; that the EAC would do well to follow those agencies that have made a priority, perhaps even an obsession, about transparency and openness. And there are a number of specific things that I would urge that the EAC do.

First, the research activities, because they are such an important part of what the EAC does, should be wholly transparent. The statute in this regard I think is very helpful. Section 207(2) of HAVA specifically directs that any report that is commissioned by EAC be provided to Congress and the President. It does not provide any authority for editing that. Naturally the EAC is free to comment on those reports, to criticize them. If they wish to itemize the portions of those reports that they think are weak, that is entirely appropriate, indeed consistent with the mission of promoting a full dialogue. But the statute I think is very clear that that is not something that can be done. When agencies in administrations of either party in the past have attempted to edit research that they have received, the consequences have often been very severe. The research itself becomes devalued, as it is regarded as being tainted by partisan influence and other studies completely unconnected with that incident become suspect because the suspicion is that the agency wouldn't have let it through had it not met the agency's political litmus test. And again I am not referring to administrations of either party. Alas, administrations of both parties have made that mistake.

The sensible thing to do when you get a bad report, I lack the expertise to know whether the ones we are discussing here are good or bad, but if you do get a report you think is bad, you should release it and release your own statement as to what you want done. The EAC has authority and resources to contract for follow-up reports and research that perhaps can get at some of the things that they might be concerned about.

Secondly, the agency's research contracting needs to be beyond reproach. One possibility is to hire researchers who have long records and are regarded as nonpartisan; another possibility is to pursue bipartisan teams. My understanding is the EAC at times has gone in either of those directions. What clearly should not be appropriate is to allow officials that are connected with any partisan organization, be it this Congress in either side of the aisle or an administration, which inevitably is of one party or the other, to have an influence in or criticism of the selection of researchers or the product that they issue.

I think it is unfortunate that political officials of the Department of Justice were serving on the board. As I read the statute, it

names a number of sorts of officials that are partisan, such as State legislators or Governors. And in each of those areas it calls for two of them, the obvious intent being one be a Democrat and one be a Republican. There are only three officials listed in that statute that are not identified by partisan status, and those are all career officials of the Federal Government who were thought to be nonpartisan. It is unfortunate that one or more of those slots may have been assumed by a partisan appointee, and the commission should have endeavored to prevent that and certainly should have endeavored to keep such persons from influencing its research. Those boards have important roles to play, but screening the agency's research does not appear from my reading of the statute to be one of them.

Finally, it is very important to follow the statutory procedures for decisions. Among groups of friends consensus is obviously better than voting. But in public agencies the statute is emphatically clear that there must be three votes for all actions of the agency, and that there must be public meetings at which those votes take place. If anything happened of any consequence in the name of the agency, there should be a record of a public meeting and at least three votes to support it.

Thank you very much.

[The statement of Mr. Super follows:]



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Professor of Law

TESTIMONY OF DAVID A. SUPER
Before the SUBCOMMITTEE ON ELECTIONS
of the COMMITTEE ON HOUSE ADMINISTRATION

August 2, 2007

Good afternoon Chairwoman Lofgren, Representative McCarthy, and Members of the Subcommittee. My name is David Super, I am a professor of law at the University of Maryland, and I am grateful for the opportunity to testify before you on the important subject of this hearing. My specialty at Maryland is administrative law; accordingly, I will focus on the issues the Election Assistance Commission (EAC) faces as a new administrative agency in developing the capacity to carry out its mission. I am not an expert in election law specifically: my concerns here are with process.

Reliance on specialized administrative agencies with substantial independence goes back to the earliest days of this country. President Jefferson established a series of administrative tribunals to enforce the embargo during the crisis that preceded the War of 1812. The push westward from the original coastal colonies was overseen by government land offices operating with broad autonomy. Many trace the modern administrative state to the organization of major

economic regulatory bodies such as the Interstate Commerce Commission in the late 19th and early 20th centuries. Surges in the creation of independent federal regulatory agencies occurred during the New Deal and again during the late 1960s and 1970s. States, too, rely heavily on independent regulatory agencies; some even accord those agencies special constitutional status.

Federal and state governments establish independent regulatory agencies for a variety of reasons. Some agencies are established to amass and bring to bear specialized expertise. Others are seen as more efficient ways of maximizing public participation in important decisions than a general-purpose legislative body. Still others are expected to respond more rapidly to fast-changing economic, social, or technological developments than Congress or a state legislature could. Conversely, administrative agencies can be seen as repositories for institutional memory, insuring more continuity of policy than a legislative body or executive could produce through rapid personnel changes and switches in partisan control. Often agencies are chartered to remove volatile issues from partisan politics in the hope that reason and compromise can better prevail when removed from the pressures weighing on elected officials and their close aides.

Identifying which of these general types of functions an agency is expected to perform is crucial to determining how an agency should conduct itself. The Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1678 (2002), gives EAC a mission combining several of these functions. Section 206 makes clear that Congress expects to look to EAC for expertise and intends that state and local elections officials will be able to do the same. On the one hand, EAC must keep pace with changing technology and with new threats to the integrity and accessibility of the electoral process. On the other hand, however, EAC's research and clearinghouse function should help public officials at all levels avoid repeating mistakes their peers or forebears have made. Above all, EAC must remove the most quintessentially partisan

issue from partisan politics and the unavoidable conflict of interest that Members of Congress and other elected officials have on these matters. The law's painstaking provisions for ensuring partisan balance on the commission and barring any action without bipartisan consent testify to this. Because section 209 severely limits EAC's rule-making authority, Congress expected it to perform these vital functions almost entirely through its public information function under section 207(2) and otherwise. EAC's credibility thus is absolutely paramount; unlike most other agencies, it has no fallback source of authority should its moral authority be compromised.

The choices an agency makes in its first years are particularly crucial to setting a tone for its future activities. These will determine what kinds of people seek and obtain employment at the agency, the extent of the trust that other agencies and private sector entities place in the agency's work, the inclination of appropriators to fund its activities and that of authorizers to entrust it with new responsibilities, and the courts' willingness to defer to its substantive judgments. Once an agency develops a particular kind of institutional culture, even the most determined political leaders and the ablest managers will be hard-pressed to achieve meaningful change. Like a bicycle wheel, once bent it is almost impossible to set right.

A couple of examples will illustrate the point. The National Labor Relations Board's (NLRB's) mission is to deal with intensely controversial issues that, for much of its life, have tended to divide the two major parties. On a number of important issues, its rulings were predictably partisan: when Republican appointees held a majority, it would resolve an issue in favor of management; shortly after its majority switched, it would reverse itself to favor unions, only to reverse itself again when Republicans regained control. This pattern was widely recognized by all concerned. Parties were disinclined to accept defeats as representing an impartial view of justice in their cases. Presidents faced strong pressure to nominate board

members whose votes would be highly predictable. Courts, although lacking the Board's expertise in labor-management relations, felt obliged to undertake searching inquiries into the merits of the Board's decisions at times when other agencies were receiving broad deference. Courts also periodically berated the Board for failing to honor applicable case law in its decisions.

This brief account obviously sweeps very broadly, perhaps too much so. The Board has done a great deal of excellent work, and both Board members and staff have endeavored to pursue sound, responsible public policy that could be defended in any political environment. Nonetheless, the perception of partisanship, once attached to the Board in even a handful of actions, has proven difficult to dislodge and has undermined its credibility and effectiveness at crucial junctures.

A marked contrast is the Food and Nutrition Service (FNS) of the U.S. Department of Agriculture. Reflecting the strong, thoroughly bipartisan support food assistance programs had achieved, the Ford Administration stocked the fledgling agency with skilled professionals devoted to public service, regardless of political beliefs. From their earliest days in the agency, these officials set strong institutional norms that the staff would faithfully assist the Department's political leadership of either party pursue their agendas, that it would evenhandedly implement whatever directions it received from Congress, and that it would dissemble to no one. Because successive administrations had no need to clean house or to stack the agency with political operatives, the agency has avoided paralysis during transitions between administrations and preserved an institutional memory that has helped both successive administrations and Congresses avoid repeating past mistakes. As one would expect of an agency dispensing tens of billions of dollars of benefits and administrative funds, FNS has had its conflicts

with states, service providers, advocates for recipients, and others. Debates on the merits of these matters occasionally have grown heated, yet virtually no one has questioned the agency's good faith – or had any reason to believe they would be taken seriously if they did. Not surprisingly, the agency has an enviable record of success defending its decisions in court. On those rare occasions when political appointees from either party sought to use their power for partisan ends – editing research findings or diverting the agency's research budget – Members of Congress from both parties indignantly demanded that FNS's integrity be preserved. Even though most of the pivotal figures in the agency's formative years have now retired or will be doing so soon, the culture of service and loyalty they established has remained in full force.

It is worth noting that FNS lacks the structural guarantees of independence that NLRB – and EAC – enjoy. Unlike them, it lacks a multi-member board with members serving fixed terms; its top leadership is composed entirely of political appointees of the sitting President's party. FNS's success is a monument to what a carefully cultivated institutional culture of integrity and public service can accomplish, the highest calling of our much-maligned federal bureaucrats. Political appointees of successive administrations and both parties have recognized that FNS's staff's loyalty to the process, and universal credibility, are priceless assets, facilitating accomplishment of their respective policy agendas far more than an ideological staff, even one with similar persuasions, ever could.

EAC would do well to learn from these examples. Although NLRB's course was not unlawful or even particularly unusual, the perception of partisanship has proven extremely costly to the agency over the years. Conversely, although no statute, regulation, judicial decision, or even written guidelines dictated FNS's exceptionally demanding conception of integrity, the agency has been richly rewarded for pursuing it. As leaders of an agency that is still very new,

EAC's commissioners should endeavor to inculcate the same culture of professionalism, independence, and integrity that has served FNS so well over the years.

In practice, this has several implications. First, EAC's research activities should be wholly transparent. In such a politically-charged atmosphere, transparency is even more vital than quality. Should EAC withhold reports, even bad reports, from public scrutiny, however, it will invite doubts about what criteria it applied to withhold the report. Because Members of Congress, journalists, and the research community will be unable to examine the withheld report, they can only speculate as to the agency's motives. The corrosive effect of this speculation for a new agency in a hypersensitive field is difficult to overstate. Statistical analysis depends on having unbiased access to data; otherwise valid statistical methods lose their reliability if applied to a data set known in advance to have the characteristic the researcher is seeking. Even if all reports EAC releases are methodologically flawless within their own terms, any suspicion that their release depended on their findings will rob them of much of their value. Except in the rarest of cases where a report divulges matters protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b), such as military secrets or individuals' medical records, withholding reports is not a legitimate option and is not routine practice among federal agencies.

Nor is editing these reports, or directing the authors to do so, the correct answer. When an agency makes policy, it must of course take full responsibility for its pronouncements. EAC, however, is charged with making research available to Congress, state and local elections officials, and the general public for the purpose of stimulating informed debate and policy-making. It therefore need not, and indeed cannot, guarantee the accuracy of every aspect of every report it commissions. Correcting any flaws in such reports is the function ensuing public debate. To be sure, agencies commissioning research occasionally do ask their contractors to

perform additional work if the contractors' initial product is unclear in some respect or failed to cover all topics on which research was required. They might, for example, require a methodological appendix or performance of additional statistical tests. Making or requiring changes in the content of what the contractor has provided, however, destroys the credibility and value of the entire report. On the rare occasions when this has occurred, administrations of both parties have faced severe, bipartisan criticism from Congress and the research community.

The only proper course for EAC to follow with a commissioned report it believes is flawed would be to release that report together with a statement of what it believes the flaws to be. If these criticisms are persuasive, surely they, and not the flawed report, will carry the day. EAC might face minor criticism of its procurement policies should it appear the commission hired a contractor who turned out to lack the skills to accomplish its assigned tasks successfully. That criticism, however, would not go to the core of EAC's mission.

In fact, this is precisely what Congress has directed. Section 207(2) requires the EAC, without exception, to release reports submitted to it. Several sections of the Act specifying particular subjects for the commission's research specify a two-part process: EAC is to release the report and, separately, makes its own recommendations. Compare, for example, sections 241(a) and 242(a), which require submission of the reports EAC has received, with sections 241(c) and 242(b), which call for EAC's recommendations. Thus, although Congress has by no means obliged EAC to remain passive in the face of reports the commission finds troubling, it has denied the commission the option to withhold the reports.

Second, EAC's methods of selecting research contractors must be scrupulously guarded against even the appearance of partisan bias. To be clear, the issue here is *not* that the selections must be free of *actual* partisanship; here, the mere *appearance* of bias will be devastating. Con-

sider the different standards of professionalism we apply to lawyers and to judges. For the most part, lawyers must avoid only actual conflicts of interest and circumstances where actual conflicts are likely but difficult to detect. A similar standard – prohibiting actual improprieties – would suffice to ensure substantively proper judicial decisions. Judges’ responsibilities, however, go beyond merely issuing correct decisions: they also have a duty to maintain the public’s confidence in our justice system. We therefore require them to avoid even the *appearance* of impropriety.

For much the same reason, EAC should not satisfy itself merely with selecting researchers whom it believes are non-partisan. It should ensure that they will appear non-partisan to members of both political parties and to the public at large. In practice, this may require hiring teams containing at least one member who has established credibility with each political party or hiring veteran researchers with a sufficiently extensive record of non-partisanship to inspire wide confidence on both sides of the partisan divide.

The difficulty of securing unbiased expertise is a common one for independent agencies: by the time an individual has developed sufficient expertise to help the agency, she or he typically has spoken out on some of those issues, often as an employee of one or another interested party. In weighing allegations of officials’ bias, courts have distinguished between an unalterably closed mind on the specific matter before the agency – which is impermissible – and a natural commitment to the purposes of the agency’s statutory mandate – which is not only acceptable but actually desirable. A researcher who wants to expand access or one who wants to reduce fraud should not be regarded as biased: indeed, someone holding the opposite viewpoint on either of those questions would be the one meriting suspicion. The appearance of bias toward a particular political party, however, should not be acceptable unless that researcher is paired

with a colleague with an equally apparent bias toward the opposite party. Courts have been reluctant to compel recusal of unique senior officials appointed by the President and confirmed by the Senate. EAC labors under no similar difficulty: it can and should apply a very strict test for screening out partisan bias in the research contractors it engages.

Even more important than these substantive considerations is that EAC scrupulously follow competitive bidding procedures for merit-based selection of contractors. This includes limiting access to the bidding and decision-making process while it is under way to officials whose participation is essential. Moreover, on such sensitive matters, participation in contracting decisions should be limited to persons who are wholly independent of partisan affiliation or to pairs of persons with opposite affiliations. EAC should have strict rules prohibiting any discussion of bids with officials of the incumbent administration as those officials obviously owe their positions to the incumbent President's party; if for some reason EAC needed to consult with such officials, it should simultaneously hold identical consultations with the congressional opposition.

Above all, however, no policy for awarding public contracts will have credibility if its final decisions are subject to re-opening on the same grounds on which the decision was originally made. When a government agency awards a contract to General Motors, Ford is not permitted to argue that the bidding should be reopened because it makes a better car. EAC cannot stop interested parties from complaining about its awards of contracts, but it should make unmistakably clear that those awards are final. If, as has been publicly alleged, EAC has withheld reports received from contractors whom political appointees in the Justice Department criticized, it has at the very least created a strong appearance of impropriety: the fact that it was under partisan pressure to drop those contractors should prompt the commission to make especially sure

that those contractors' reports are *not* suppressed. Withholding particular reports in the face of partisan pressure would cast a pall over all research performed for the commission, suggesting that any reports that are released must have passed a partisan screen and hence that the body of work released is systematically unbalanced. Surely the commission cannot intend this devastating result.

Third, EAC should exercise particular caution in areas where its jurisdiction overlaps with that of the U.S. Department of Justice. Overlapping jurisdiction of independent agencies and cabinet departments is not particularly unusual. For example, both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) share responsibility with the Justice Department over some kinds of anti-competitive practices. In these instances, where the congressional delegations are clear, the agencies should presume that Congress intended the overlap and sought to have each agency's expertise brought to bear on the problem. It would frustrate this statutory arrangement and undermine the justification for the independent agency to defer to the cabinet agency rather than exercising its own independent judgment. Thus, the FCC has questioned some telecommunications mergers that the Justice Department had accepted.

Caution is particularly appropriate in the case of EAC's responsibilities overlapping with the Justice Department. Because Congress created EAC so recently, we can be quite certain that it was aware of the Justice Department's work interpreting election laws and saw the need to supplement that activity by directing EAC to issue voluntary guidance under section 311. This should not be surprising given then politically sensitive nature of EAC's charge: at any given time, the Justice Department will be under the control of one or the other major political party. Although we can hope that the Justice Department in any administration will limit partisan appointees' involvement with these issues, Congress recognized that this might not always be the

case when it established EAC as an independent entity rather than as an arm of the Department. Coordination and inter-agency comity are generally desirable qualities, but an agency established as an impartial watchdog cannot perform its role if it coordinates its policy with a department whose work it may need to call into question.

Finally, EAC must take great care to abide by its statutory mandates that all of its actions be approved by a vote of at least three commissioners and that all votes be recorded in its annual reports. These reports will be the primary means by which Congress, journalists, and members of the public assess EAC's performance and identify any changes that may be required in its operation or in HAVA itself. Should the commission permit its staff to issue interpretations of the statute or make other policy statements without a majority vote of the commission, it will both be disregarding Congress's clear direction and opening itself unnecessarily to accusations of partisanship. HAVA provides for selecting and compensating EAC's staff, but unlike the statutes authorizing some other administrative agencies, it does not provide any independent authority for staff to act on behalf in any substantive respect.

In a small agency such as EAC, commissioners and staff may feel drawn towards informality. Once casual consultations around the water cooler make clear that the commissioners unanimously support a particular course of action, holding a formal meeting and vote may seem superfluous. To be sure, the effectiveness of a bipartisan agency such as EAC depends on its ability to engender consensus. That, however, does not justify dispensing with formal actions. First, doing so violates HAVA: section 208 allows EAC's authority to be exercised only by the vote of at least three commissioners. Second, acting without formal meetings violates the Sunshine Act, 5 U.S.C. § 552b(b), which declares that "[m]embers shall not conduct or dispose of agency business other than in accordance with this section," which requires public notice and

an opportunity to attend any meetings of the commission. Finally, such informality on matters as sensitive as elections administration will inevitably lead to miscommunications that undermine public confidence and intra-agency trust. Informal consensus processes leave room for misunderstandings about what is being decided. And without a recorded vote, blame will be cast widely for decisions that in retrospect prove infelicitous. EAC, more than almost any other agency, should scrupulously comply with statutory requirements for decision-making.

As to the particular issue of construing voting statutes, Congress clearly did not empower EAC to issue interpretations with the force of law. On all legal matters before the Board other than mail voter applications, Congress was careful to characterize the Board's actions as "voluntary," as "recommendations," or the like. In section 209, it expressly denied the commission other rule-making authority. Thus, under *United States v. Mead Corp.*, 533 U.S. 218 (2001), any interpretations EAC offers would not be entitled to the strong deference of *Chevron, U.S.A. v. N.R.D.C.*, 467 U.S. 837 (1984). Its influence on the courts would be limited to its "power to persuade" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Factors that would increase the persuasiveness of such interpretations include limiting the opinion to the statutes EAC is charged with interpreting under section 312, having EAC approve the interpretation by majority vote as section 208 requires, and clearly analyzing the relevant legal materials. Once an agency develops a reputation with the courts of opining casually, it may have great difficulty securing judicial deference in the future, even on matters central to its responsibilities. This prudential consideration – husbanding the commission's credibility – counsels careful compliance with the limits of its statutory interpretive jurisdiction.

This concludes my prepared testimony. I would be pleased to answer any questions that Members of the Subcommittee may have.

The CHAIRWOMAN. Thank you very much, Professor. And now we turn to Professor Montjoy. Welcome.

STATEMENT OF ROBERT MONTJOY

Mr. MONTJOY. Thank you very much, Chairman Lofgren, Ranking Member McCarthy, and other members of the committee. I appreciate you having me here, and I want to talk to you about the importance of the Election Assistance Commission and particularly its information role. I am a professor of political science at the University of New Orleans. I am Director of the Master Public Administration Program there. I am also a registered Democrat, but I try to take my party hat off when I study election administration.

Growing up in the South before the passage of the 1965 Voting Rights Act, I saw the effects of fraud and intimidation on voters. And as a result I became interested in the fair and accurate administration of elections, a subject of which I have pursued throughout my career. Most of my experience in elections comes from Alabama, where I spent 25 years teaching and doing outreach, statewide outreach, at Auburn University.

My message today is simple. The U.S. election system is under great stress because of increased complexity and rapid change. A change in one part can have unanticipated consequences in another. The EAC plays an essential role in providing vital information for that system. It has built and must continue to build expertise that Congress and policymakers and administrators at the State and local levels can rely on.

I also believe that the EAC contributes significantly to the professionalization of election administration. As officials learn about best practices, for example, from other jurisdictions they begin to identify with other election officials committed to ethical, technical and administrative standards. Because the EAC's information role is important the process by which it produces and releases information is also important. This is especially so in highly contentious areas where beliefs are strongly held.

The case of the study on fraud and intimidation is illustrative. Fraud and intimidation are vitally important issues because they are a threat to democracy. They are also extraordinarily difficult to research because much of the alleged behavior is hidden.

The EAC commissioned a bipartisan team of consultants to define the terms, collect existing knowledge from published sources and interviews, and suggest the most promising directions for further research. This was essentially the first step in a research design. The consultants collected and submitted a great deal of useful information. They also submitted a report summarizing their findings. The EAC, rather than publishing their summary, used this information and information collected by its own staff to produce and publish its own report.

Now, I believe there is no question that the EAC has the right to use the information that was submitted to it. It is pretty clear in the contract that was signed. However, an article in the New York Times that has already been mentioned raised a question of whether the original report was modified for political considerations.

The other side of the coin of course is that an agency has to take responsibility for its own product, in this case information. Just take the one example from the Times article. It says, though the original report said that among experts there is widespread but not unanimous agreement that there is little polling place fraud, the final version of the report released to the public concluded in its executive summary that there is a great deal of debate about the pervasiveness of fraud.

Now, the consultant's statement was taken from the section of their report that summarized the interviews with 24 or 25 participants. But later in the section where they are summarizing existing research they wrote, there is tremendous disagreement about the extent to which polling fraud; e.g., double voting, intentional felon voting, noncitizen voting, is a serious problem. So faced with this inconsistency the EAC chose to report the disagreement.

Now, in academic circles withholding judgment in the absence of clear evidence in one direction or another is a standard research practice. And this study, as I understand it, was the first step in an ongoing process which I think is a critically important process. Now the EAC has changed its procedures to put research online. So I think it has a clear process by which it will air the research while at the same time holding its imprimatur for the things that it thinks is correct.

Given that the EAC is a young agency still working at its organizational routines, I would like to add a recommendation for a formal peer review process, including some academic researchers, and I would suggest that the review process apply both to the design phase of a project as well as to the acceptance phase. The information role is very important.

Thank you.

[The statement of Mr. Montjoy follows:]

Testimony of Robert S. Montjoy, Ph.D.
Professor of Political Science
University New Orleans

Before the House Committee on House Administration, Elections Subcommittee

Thursday, August 2, 2007

Chairwoman Lofgren, Ranking Member McCarthy, and Members of the Subcommittee, thank you for allowing me to appear before you. I want to talk with you about the importance of the Election Assistance Commission and, particularly, its information role. I will try to put this role in historical perspective and then discuss the present activities of the Election Assistance Commission.

First, let me give you some information about myself. I am a professor of Political Science and director of the Master of Public Administration program at the University of New Orleans. My primary field is public administration and, as I explain below, I have a special interest in the administration of elections. I am a registered Democrat, but I believe we should leave our party labels at the door when we enter the realm of election administration.

Growing up in the South before the passage of the 1965 Voting Rights Act, I saw the effects of fraud and intimidation on voters. As a result, I became interested in the fair and accurate administration of elections, a subject that I have pursued throughout my career of over thirty years as a college professor. I have done studies for the Federal Election Commission and am now engaged as a subcontractor in a study for the EAC. Most of my work, however, was at the state level and local, primarily in Alabama, where I served for twenty-five years as a professor and administrator at Auburn University. There I developed statewide training materials for election officials, wrote rules for electronic voting, and led the state's implementation of a federal court order designed to recruit and train a more representative cadre of poll workers. I helped to create the Election Center's national training program in election administration, and I serve on the Board of Directors of the Election Center.

My message today is simple. The U.S. electoral system is under considerable stress because of increased complexity and rapid change. The U.S. Election Assistance Commission plays several vital roles. In the long run, I believe, the most important role is the provision of accurate, unbiased information to policy makers, administrators, political activists of all stripes, and the American people. It must have resources and authority to play that role properly.

Public administration is paying a good bit of attention these days to the tools of government, or policy instruments, the mechanisms by which governments get things done. There are a variety of such instruments, but they fall under four broad categories: direct provision of services (doing it yourself), authority (telling someone else what to do), money (grants, contracts, subsidies, etc. to affect the behavior of other parties), and

information (telling what, how, and why to affect the behavior of other parties). Money and information can build capacity as well as induce compliance. The federal government has often used its authority over elections for federal office, but except for payments included in HAVA, it has not used federal funds to build capacity in the electoral system. On the other hand, information has been an important tool in facilitating the implementation of federal mandates and in improving the administration of elections more generally.

Beginning with the Voting rights Act of 1965, a series of federal mandates have significantly complicated the task of local, and more recently state, election offices.¹ This is not to argue about the merits of the changes, but only to point out that they placed significant new demands on what had been a largely a local, clerical function. (Of course, earlier mandates, such as the 14th, 15th, 19th, and 24th Amendments to the Constitution had major impacts on elections, but they did not require significant changes in the organizational routines of elections offices.) One result was that elections officials began to look outside their own jurisdictions for help.

Congress responded to the need for assistance in the Federal Election Campaign Act (FECA) of 1971, which created the Office of Federal Elections in the General Accounting Office (GAO, now the Government Accountability Office). This office commissioned two studies that really began a national dialogue on problems of election administration and the management of technology. A 1974 amendment to FECA created the Federal Election Commission, and the Office of Federal Elections moved to the FEC to become the National Clearinghouse on Election Administration. That office sponsored numerous studies and conferences that raised issues and provided much useful information to elections officials. The series of regional workshops on the implementation of the NVRA is but one example. Under HAVA the Clearinghouse staff and its information role moved to the new Election Assistance Commission (EAC).

As you know, the EAC is a young agency. The first commissioners were confirmed in 2003, and the position of executive director was not filled until 2005. Like all new agencies it has had to acquire staff, establish internal operating procedures, and work out relationships with other parties in its task environment (such as NIST and DOJ) and in its political environment. Like many agencies the EAC has had to create advisory committees, in this case two large ones with numerous requirements for representation. The bipartisan structure of the Commission is critical for its role, but it also builds an internal system of checks and balances that can slow action. This condition is probably exacerbated by frequent turnover among commissioners. Still, the Commission has produced a number of reports and advisories that are valuable to policy makers and administrators at all levels of government

¹ These include the preclearance requirements of the VRA, absentee voting requirements in the Uniformed and Overseas Absentee Voting Act of 1973, language requirements of the 1975 amendments to the VRA, assistance in voting in the 1982 amendments to the VRA, polling place accessibility in Voting Accessibility for the Elderly and Handicapped Act of 1984, a broad prohibition on exclusion from public services in the Americans with Disabilities Act of 1990, interaction with numerous external agencies and new rules affecting registration and voting in the National Voter Registration Act of 1993, and numerous changes in the Help America Vote Act of 2002..

Let me make a couple of points about the information role that has moved from GAO to FEC to EAC. First, while the EAC is not the only federal agency providing information relevant to election administration,² it is the only one that attempts to encompass the totality of interrelated functions that make up the administration of elections (including voter registration) in the United States. This point is important because changes in one part of the system can have unanticipated consequences in another. As policy makers, especially Congress, consider various proposals to improve the electoral process, they need access to information that is objective and comprehensive. The EAC has built, and must continue to build, expertise in this area.

Second, the information provided by the EAC and its predecessors has had, and is having, important consequences for the elections community. States and localities rely on EAC guidance in many decisions. The most obvious example is the fact that most states are adopting federal standards for voting equipment, thereby changing voluntary information into regulatory mandates for their local jurisdictions. Less obvious, but also important, is the contribution to the professionalization of election administration. As noted above, the increased complexity of their tasks has stimulated election officials to look outside their own jurisdictions for help and, in my opinion, to begin identifying with other elections professionals as a group committed to certain ethical, technical, and administrative standards. By collecting and disseminating information on elections, especially best practices, and by involving practitioners in its programs, the EAC fosters this movement.

Because the EAC's information role is important, the processes by which the Commission produces and releases information are also important. This is especially so in highly contentious areas where beliefs are strongly held. I will try to use a study of fraud and intimidation to illustrate a few points that may be useful in future research. Basically, the Commission contracted with consultants Job Serebrov (a Republican) and Tova Wang (a Democrat) to conduct research on these subjects. The consultants submitted a draft document with their names on the title page as authors. The EAC made changes in the document and released it under its own name. An article in the New York Times (April 10, 2007) reported key changes that the EAC had made and concluded: "The revised version echoes complaints made by Republican politicians, who have long suggested that voter fraud is widespread and justifies the voter identification laws that have been passed in at least two dozen states."

Wherever they exist, fraud and intimidation are a threat to the true expression of the public's will, and even where they do not exist, belief in them can undermine the public's faith in the democratic process. It is critically important to learn what we can about these topics. It is also extraordinarily difficult to research them, both because there has been no consensus on what we mean by the terms and because the much of the alleged behavior would necessarily be hidden.

² The Departments of Justice and Defense, for example, are quite active in providing information to numerous parties about the federal requirements under their jurisdictions.

Recognizing these difficulties, the EAC sought a preliminary study to lay the groundwork for further research. It asked for definitions of the terms, a compilation of existing research, and suggestions for further research. The draft document included some promising suggestions about research, the variety of which also illustrates the challenges of research in this area. The allegations of political influence are directed, not at these suggestions, however, but at several generalizations about the incidence of fraud and intimidation, which go beyond the original statement of work.

As is often the case, there are opposing principles involved. The potential for political interference in government-sponsored research is clearly a matter of concern, as the ongoing debate over global warming, or climate change, illustrates. The concern is particularly acute for the EAC because it deals directly with the electoral process and is supposed to avoid partisan positions. The EAC, on the other hand, presents its action as a matter of quality control. An agency is not required to, and indeed should not, put its imprimatur on information that it believes is incorrect, misleading, or inconclusive.

Other institutions exercise quality control on information. The courts have rules of evidence that are enforced by judges. Academic and professional journals use the peer review process. (I have had articles rejected by anonymous reviewers, and, as a reviewer, I have recommended rejecting articles.) Surviving a peer review does not mean that a piece of research is necessarily without flaws. Once published, it may well be the subject of counter-arguments and criticisms in the market place of ideas. But it has to clear that initial hurdle to get into the market.

The Serebrov and Wang report was released, but not in its original form, and the EAC, not the authors, made the changes. It seems clear that the EAC had a legal right to modify the document. The contract specifies: "All research, information, documents and any other intellectual property, (including but not limited to policies, procedures, manuals, and other work created at the request or otherwise while laboring for the EAC) shall be owned exclusively by the EAC, including copyright."

But that fact does not address the issue of political influence. The contention of political influence would seem to hinge on evidence that (a) there was political influence and (b) what the agency did was not reasonable as a quality control matter. In the New York Times article the inference of political influence is based on the fact that some of the changes favored a Republican position, or "downplayed" conclusions that supported a Democratic position. Let me examine this argument by comparing it with what I consider to be some reasonable conclusions regarding quality control.

The first complaint in the New York Times article of April 10 is:

Though the original report said that among experts "there is widespread but not unanimous agreement that there is little polling place fraud," the final version of the report released to the public concluded in its executive summary that "there is a great deal of debate on the pervasiveness of fraud."

Reading this, I would conclude that a fairly large sample of experts had substantially agreed that there is little polling place fraud. The draft report is more careful. The authors described a process of selecting interviewees and in an appendix listed the names of the 25 people whom they actually interviewed. Then, on page 7, in a section reporting general themes from the interviews they wrote:

There is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than is claimed, including voter impersonations, “dead” voters, noncitizen voting and felon voters.

They did not report how many people took each position or whether any of the interviewees declined to take a position on this issue. Thus, it is impossible for the reader to make an independent assessment of the claims.

Later in a section entitled “Existing Research” on page 13 they wrote:

There is tremendous disagreement about the extent to which polling place fraud, e.g. double voting, intentional felon voting, noncitizen voting, is a serious problem. On balance, more researchers find it to be less of a problem than is commonly described in the political debate, but some reports say it is a major problem, albeit hard to identify.

In her letter to Senators Feinstein and Durbin dated May 18, 2007, EAC Chair Donetta Davidson wrote that the quote based on the interviews did not take into account the rest of the research and that the Commission did not want to base its findings on the opinions of a small number of people. As the quote from the section on existing research demonstrates, that is factually correct, even if one looks only at the body of the report and not the books, articles, and other reports cited. Whether the language substituted by the EAC was the most appropriate resolution is a judgment call. But it was clearly not unreasonable to avoid a conclusion that was inconsistent with another part of the report. The fact that the Times reported the first statement from the draft, and not the second or both of them, illustrates the danger of releasing partial conclusions.

Another question is whether collecting opinions of the interviewees or those expressed in other sources is a valid way to measure the incidence of voter fraud and/or intimidation. The persons interviewed are knowledgeable people, and at least a few of them have direct experience with such crimes. But, as the authors point out later, determining with any accuracy how widespread they are would be very difficult, if not impossible.

One wonders why the EAC would approve the research design used in this study if the goal were to measure the incidence of fraud and intimidation. The answer appears to be that such a measure was **not** the intent of the contract. At least it is not included in the statement of work. That statement called for “a comprehensive definition of what constitutes fraud and intimidation in the federal context, ... background research ... regarding these topics, ... and promising avenues for future research by the EAC.” It cannot be argued that approval of a project, including its research design, implies a

commitment to accept or publish the result if the conclusions go beyond the intent of the project or the capacity of the research design.

A second complaint in the New York Times article was:

The original report on fraud cites “evidence of some continued outright intimidation and suppression” of voters by local officials, especially in some American Indian communities, while the final report says only that voter “intimidation is also a topic of some debate because there is little agreement concerning what constitutes actionable voter intimidation.”

From this quote I would expect to see evidence or at least a citation to evidence, of intimidation and suppression. In its summary of interview themes, the draft report says:

Abuse of challenger laws and abusive challengers seem to be the biggest intimidation/suppression concerns, and many of those interviewed assert that the new identification requirements are the modern version of voter intimidation and suppression. However, there is evidence of some continued outright intimidation and suppression, especially in some Native American communities.

The problem is that no evidence is provided or cited in the study. Without both specific examples and a shared definition of the terms, it is impossible to evaluate the accuracy of the statement. The full EAC revision of the above statement reads:

Voter intimidation is also a topic of some debate because there is little agreement concerning what constitutes actionable voter intimidation. Some studies and reports cover only intimidation that involves physical or financial threats, while others cover non-criminal intimidation, including legal practices that allegedly cause vote suppression.

This statement, while accurate, fails to convey the sense of concern and importance of the original statement. Like the first correction, it takes a cautious position by emphasizing the uncertainty of the conclusion.

The third example in the Times article is:

The original report said most experts believe that “false registration forms have not resulted in polling place fraud,” but the final report cites “registration drives by nongovernmental groups as a source of fraud.”

This complaint is different from the other two in that it indicates not only a downplaying of findings but a positive assertion to the contrary. Withholding judgment in the absence of strong evidence is consistent with the canons of academic research. That is what the EAC did in the first two cases. In this

example, however, the EAC seems to turning the researchers' conclusion on its head. This discrepancy appears due to the fact that the two documents were addressing different issues. The EAC statement dealt with the occurrence of fraud during the collection of registration forms while the consultant's report dealt with the question of whether false registration forms resulted in fraud at the polling place. The two statements appear to be in contradiction because of the way they are joined in the newspaper article.

The full quote from the draft report of the interviews is:

Most people believe that false registration forms have not resulted in polling place fraud, although it may create the perception that vote fraud is possible.

The EAC report addresses this issue in two places. The first dealt with a summary of published research:

One point of agreement is that absentee voting and voter registration by nongovernmental groups create opportunities for fraud. For example, a number of studies cited circumstances in which voter registration drives have falsified voter registration applications or have destroyed voter registration applications of persons affiliated with a certain political party. Others conclude that paying persons per voter registration application creates the opportunity and perhaps the incentive for fraud.

The second dealt with the interviews:

For example, the interviewees largely agreed that absentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying and voter registration fraud. They similarly pointed to voter registration drives by nongovernmental groups as a source of fraud, particularly when the workers are paid per registration.

The EAC staff based the revisions on their independent review of the literature and interview notes, which they made available for my review when I requested them. A number of the interviewees did discuss "fraudulent" activities in the collection of registration forms, but they were not operating with a common definition of fraud in these instances. The generalizations presented here are not inaccurate, but they do not represent the same sort of caution that the EAC applied with the two previous quotes.

The preceding examples offer a glimpse into the nature of the changes in the original report. Clearly, the EAC had authority to use the information submitted to it and, clearly, it had authority to issue a report in its own name. The question is whether the modifications suppressed or modified valid information for political or other reasons. Given the polarized nature of opinions on the issues and the way in which individual

statements can be used, as the news article reviewed here indicates, it was not unreasonable for the EAC to try to avoid premature judgments.

The issue of whether the original research on fraud and intimidation should be made public is now moot because the EAC has decided to release it and all the related documents. The case should serve as a basis for thought and a possible revision of procedures for use in future research contracts. The fact that the Commission has asked the EAC Inspector General to review the process is a good step. If I understand the situation correctly, the EAC now plans to submit all drafts for an online, virtual review by the Advisory Board and, if appropriate, the Standards Board. This procedure will give a broad review of the documents and, effectively, make them available to the public while not requiring the EAC to abdicate its responsibilities with regard to the final reports it publishes.

I would like to add a recommendation that the EAC Develop a formal peer review process. I would recommend finding a cadre of election officials and academic researchers (such as political scientists) who can review projects at both the research design phase and the acceptance phase. The review has to start before the official statement of work is released in order to maximize the odds of getting results that answer the questions being asked. A peer review on the acceptance end would help to eliminate errors and also remove concerns about political interference.

Another recommendation is for the EAC to continue research in this area. Caution in the face of uncertainty is entirely reasonable, but it cannot be allowed to become a rationale for inaction in the face of controversy. The consultant's report contains much valuable information that can be used as a basis for more focused projects.

In conclusion, I want to return to the basic theme that the work of the EAC in producing and disseminating information is critically important. The EAC is an essential source of expertise on elections administration. It must be trusted to produce accurate and unbiased information. For that reason, it has to exercise care in the kinds of reports that receive its imprimatur. For the same reason, it should strive to avoid even the appearance of partisanship. The IG review and the new plan for vetting documents address these concerns. I believe that a thorough peer review process would be a very valuable addition.

Ms. LOFGREN. Thank you. I will turn now to our ranking member, Mr. McCarthy, for his questions.

Mr. MCCARTHY. Well, in the spirit of bipartisanship, I think you can go first.

Ms. LOFGREN. I will then. Let me ask Professor Super, we received—as you know, we received a great volume of information from the EAC and it has now been made publicly available. I don't know if you have had a chance to look at the letter from the EAC's General Counsel to the Kentucky State Board of Elections regarding the National Voter Registration Act?

Mr. SUPER. I have.

Ms. LOFGREN. The General Counsel concluded that the NVRA allows voters to be removed from the statewide voter registration databases based upon electronic information that the voter registered to vote in another jurisdiction without any further documentation or confirmation. This response letter, as I understand it from the record, was written the very same day the EAC received the inquiry from the Kentucky Board of Elections. But there wasn't any indication that the EAC officially adopted the General Counsel's interpretation of the NVRA. Considering the very limited rule-making authority given to the EAC, do you think the EAC exceeded its statutory authority in this case?

Mr. SUPER. Well, I have seen the letter you mention and I found it very disturbing because the statute very clearly in Section 208 requires three votes for any action. The Sunshine Act requires notice of public meetings. So I can't imagine how they could possibly respond in an authorized manner the same day they get a request.

The letter is ambiguous as to whether she is writing for herself or for the commission. At the beginning she speaks about "I" and at the bottom she says "we conclude," which implies she is speaking for the commission. She obviously has no authority to speak for the commission under the statute without a proper meeting and three votes.

Also, it is not clear to me from reading the statute whether the subject matter of that letter is something that the commission is supposed to be opining on or not. But this is certainly not the appropriate manner for doing so.

Ms. LOFGREN. Let me ask Mr. Greenbaum, you were involved in the report in question. And we have heard the testimony of Professor Montjoy about the process and his recommendation, and we appreciate his testimony. But you were a participant. Do you have any—what do you think about what he said here?

Mr. GREENBAUM. Well, the thing that is interesting in terms of what happened with this report was, and you know I work with experts all the time. It would be very unusual for me to take a report from an expert, change it how I deem to see fit, never consult back with that expert and then file it with the court. And that is sort of what happened here, is that you had consultants who were picked that came back, researched, did significant research, and submitted their conclusions. And you had EAC staff changing the report without talking to the consultants at all.

Ms. LOFGREN. I am going to stop because we have been here a long time and we have got votes. And if we go promptly we might be able to let these gentlemen leave and not have to wait for our

hour of voting. I am going to yield back my time and allow you to question.

Mr. MCCARTHY. So you want to go right now? You want me to yield to you? I yield to Mr. Ehlers.

Mr. EHLERS. I thank the gentleman for yielding. The next bill up is a bill that I have to speak on and be on the floor to manage, so I appreciate you yielding.

This just sounds like a bit of a mess to me. I think some of the witnesses are making more of it than they should. This is a new agency. It appears the procedures weren't fully in place. It sounds to me like a very poor work product.

I totally agree with the comments about transparency. There should be transparency. I agree with following proper procedures. That should be done. But if you have a poor report there is no sense even trying to manipulate it. Throw it out, start over, use what you can of it.

On the dais here we have a number of experts on law, business, science. We do a lot of studies. We know when we get a good study. And if we do, we take it, run with it and maybe expand it if necessary. We know if we get a bad study, toss it out and start over. And I don't see a sense to quibble on it.

I particularly appreciate Mr. Montjoy's comments. He has a great deal of academic experience. And I think he has the ability to judge fairly quickly whether a study is good or not.

I would also like to give a quote from Mr. Chris Thomas of Michigan, as I said earlier, one of the most experienced election officials. His quote was, after reviewing the material I have concluded that the EAC was acting responsibly by not releasing portions of the contractor's conclusions that were not supported by the documentation and that were beyond the scope of the contract. In no case should a contractor be forced to allow an agency to publish a conclusion or position that lacks adequate documentation and that is beyond the scope of the contract.

And I agree with that statement. I know what good research is in my field when I see it. I have seen an awful lot of bad research, I have seen an awful lot of good research. We can make judgments about whether it was done right or not. I don't see any sense quibbling about what procedures were used after finding out something was inadequate. The important thing is to do it right. And I have confidence in the EAC to do it right, after perhaps having a false start in this one.

It is clear to me from 40 years of experience in election-related things that there is fraud. What we don't know is how much and what type. And what particularly concerns me is some of the modern manifestations of it. Since I know a lot about electronics I also can personally dream up a lot of ways to defraud people in systems. So that is what we should be looking forward to and stop trying to nitpick what fraud is taking place where, who knows what, who is doing what. Let us try to get the broad picture here. And the goal is not just to find out if there is fraud or how much. The goal is to stop the fraud. And that should be the emphasis of the studies.

We all have ideas of how we would do it because we have different districts, we have different situations throughout the United

States. And again, it has to be a comprehensive, thoughtful, careful study that really looks at all aspects of it and gives the EAC and us guidance on how to deal with real and potential fraud, particularly the anticipatory nature of stopping fraud and the geniuses that are out there dreaming up new ways to defraud.

End of sermon. Thank you for letting me go. I appreciate it.

Ms. LOFGREN. Thank you. The gentleman yields back. And I would like to out of deference to the minority let Mr. McCarthy ask his 5 minutes and then Mr. Davis.

Mr. MCCARTHY. I will be very fast. Professor Super, you said it should be three people there and it should be a public meeting, is that correct?

Mr. SUPER. Yes.

Mr. MCCARTHY. So the December meeting where it was a partisan vote for a final report with two Democrats voting yes and two Republicans voting yes unanimously, that would meet your criteria, would it not?

Mr. SUPER. If it was a properly noticed meeting and the vote was as you described, then that is a perfectly legitimate action, sure.

Mr. MCCARTHY. To Professor Montjoy, do you believe that if you get 24 interviews and use LexisNexis, is that an effective and accurate research method for determining voter fraud?

Mr. MONTJOY. Of course not. I think the interviews are very effective in determining ways to go about studying voter fraud and raising issues to be studied, which I thought was the subject of the report. I would have difficulty using opinion to determine voter fraud, period, whether it is 24 or 50.

Mr. MCCARTHY. Professor Super, would you agree that 24 is an insufficient number of interviews or do you think it is?

Mr. SUPER. I am not a social science researcher. I will say that it depends entirely on what you are trying to do. If you are trying to get a sense of what people feel, that can be very helpful. I have seen numerous Federal agencies act on the basis of literature reviews where there were many fewer than 24 examples given. If you are trying to get data on the ground, that wouldn't be a useful approach. But of course people aren't very good at responding to questionnaires about whether they have committed felonies. So that kind of review of literature or interview of experts is a very common way of getting at it.

Mr. MCCARTHY. Now, Mr. Greenbaum, you are an attorney by trade, right?

Mr. GREENBAUM. I am.

Mr. MCCARTHY. Tell me if this is correct. In your opinion the social scientist at the Eagleton study was not in any way flawed, is that correct, that you didn't believe it was flawed.

Mr. GREENBAUM. I am not offering any opinion as to whether there were any mistakes at all or whether the report was perfect. I simply pointed out the point that I—I simply made the point that they went through a vetting process, they chose this consultant, they spent half a million dollars on this consultant and at the end of the day—and I am assuming, because I know for the voter intimidation fraud study that the EAC research director was involved with the consultants. If that was true for the voter identification

study as well, it is a real shame that you put all those resources into it and at the end of the day you decide not to adopt the report.

Mr. MCCARTHY. I don't want to put words in your mouth, but if you spend a lot of money, I ask for data, data comes back, but if someone points out it is flawed it is not your opinion we would still be forced to use it, would it, just because I spent money and I worked with them and the data was flawed?

Mr. GREENBAUM. Well, once again I am not here to offer an opinion as to whether that report was perfect or not. But I mean you are talking about taxpayer money here. And the thing that calls into question all this is what we have been talking about in a more general context of where people are coming to opinions that the administration, the Justice Department don't like, and that those opinions are then rejected out of hand.

Mr. MCCARTHY. Could I just follow up with one question? Are you familiar at all with the one-tailed hypothesis test and the two-tailed hypothesis test?

Mr. GREENBAUM. I am not.

Mr. MCCARTHY. I would just argue from a sense tax dollars were used, but I would hate from a concept, one, tax dollars to be used and wasted in using the wrong data and putting it out to the American people. Just for your own information the commonly used one is a two-tailed hypothesis test. The data came back was one tail. And if you talk to others, even the PhDs in Caltech and MIT studying this, and the early results back are they think it is flawed.

I yield back my time.

Ms. LOFGREN. The gentleman yields back. The gentleman from Alabama is recognized.

Mr. DAVIS of Alabama. Do any of you have any knowledge that the EAC contacted the individuals who did the survey and told them their work was deficient? You all are shaking your heads no. Mr. Greenbaum.

Mr. GREENBAUM. My understanding is no.

Mr. DAVIS of Alabama. All right. None of you have any knowledge that the EAC made any contacts suggesting the poll was deficient, is that correct?

Mr. SUPER. No information.

Mr. DAVIS of Alabama. Do any of you have any knowledge that legal counsel for the EAC sent any communication to the entities suggesting that they had not performed the contract successfully?

Mr. SUPER. I have no such information.

Mr. DAVIS of Alabama. And you are all nodding your heads no. Do any of you have any knowledge that the EAC in any way attempted to void the contract at issue here?

Mr. GREENBAUM. No.

Mr. DAVIS of Alabama. The reason I make those points is I have a different perspective. Mr. Ehlers I think is a very able Member of Congress, but I have a different perspective on this matter and I will state it briefly. If the EAC had problems with the performance of this contract, if the EAC thought that the study that was produced was incompetent, there were several steps that were available to it. One of them was trying to void the contract, one of them was raising some legal claim suggesting that the contract

need not be followed. There were steps that were available to the EAC other than editing the report.

As I understand the EAC, and I learned more about it in these last 30 minutes than I knew before, but it is frankly not meant to be a judgmental body, it is not meant to be a policy maker, it is meant to have almost no rulemaking authority. That frankly makes it a more or less, Professor Super, administrative entity without a lot of capacity for independent judgment.

As I understand it, this was the body that was meant to make the judgments in terms of future legislation. Perhaps the executive branch may have a role as well. Obviously secretaries of state have a substantial role. But what is troublesome to me is that the EAC seems to have taken on the burden of making a judgment. What is of concern is that the judgment was shaped and influenced by one very assertive individual within the Department of Justice. That is problematic, and this is the last point that I will make.

This again has a very familiar sound to those of us who constantly hear about an administration that suppresses scientific reports that it doesn't like, to those of us who hear constant reports about an administration that suppresses and demotes scientists who take the wrong perspective. For that matter those of us who hear about an administration that demotes generals who give advice that it doesn't like. All of those things add together and they paint a cumulative picture that is all too familiar to those of us who have sat on a number of these panels in the last several months.

Ms. LOFGREN. The gentleman yields back. I thank all of the witnesses for your testimony today. We may have additional questions which we will direct to you. And we ask if possible that you respond to them promptly. And we will adjourn this hearing now, with tremendous thanks for the participation of all of the witnesses.

Thank you very much.

[The statement of the chairman follows:]



**Committee on House Administration
Subcommittee on Elections**

**"Oversight Hearing on the Election Assistance Commission"
1310 Longworth House Office Building
Thursday, August 2nd, 2007
2pm**

Statement of Chairman Robert A. Brady

I want to thank Chairwoman Lofgren for convening this important hearing regarding the policies and practices of the Election Assistance Commission. Our committee relies upon her leadership of the Subcommittee on Elections and her diligence and expertise in supporting voting rights for all Americans.

Today's hearing raises issues that affect fundamental voting rights and could affect the outcome of every federal election. The notion that our nation experiences widespread voter fraud has been repeated regularly by party activists seeking to disenfranchise impoverished and minority voters. We know from investigations by other committees that the obsession with voter fraud infected the Justice Department, with U.S. Attorneys fired in part for their failure to prosecute unfounded voter fraud allegations.

Today we will find out what happened when the Election Assistance Commission commissioned a report to investigate voter fraud. When independent investigators produced a report revealing that voter fraud played little role in U.S. elections, what did the EAC do? Did it provide the information to the public, or did it revise the investigators' conclusions and continue to support the misconception that voter fraud is a major problem with our election system?

In my own district in Philadelphia, we have had more than enough experience with efforts to disenfranchise poor and minority voters. Voter suppression and intimidation is the true election fraud infecting our democracy. These efforts must be stopped.

I am eager to learn how the EAC plans to restore the public's trust and provide research that remains uninfluenced by partisan politics.

I look forward to the findings of this hearing.

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[Whereupon, at 3:30 p.m., the committee was adjourned.]
[Information follows:]



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House Committee on House Administration, Elections Subcommittee
August 31, 2007**

**U.S. ELECTION ASSISTANCE COMMISSION
RESPONSES TO QUESTIONS FOR THE RECORD
SUBMITTED TO THE HONORABLE DONNETA DAVIDSON, CHAIR,
AND THE HONORABLE ROSEMARY RODRIGUEZ, VICE CHAIR
BY THE HOUSE COMMITTEE ON HOUSE ADMINISTRATION,
ELECTIONS SUBCOMMITTEE**

1. What is the EAC's procedure for selecting consultants and peer review group members? To what extent and under what circumstances are the political viewpoints and contributions of potential consultants/peer review group members assessed?

The procedure for selecting consultants is dictated by EAC's contracting policy, Federal law, and the Federal Acquisition Regulation (FAR). As with any other Federal agency, contracts for goods and services are governed by the FAR. EAC was specifically granted two very limited exceptions to the FAR by the Help America Vote Act of 2002 (HAVA). Other than these exceptions, goods and services are procured under the provisions of the FAR, including micropurchases of less than \$3000, simplified acquisitions of under \$100,000, and purchases of goods and services valued at more than \$100,000.

HAVA provides that EAC may contract "without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5)." See Section 205(e) of HAVA, 42 U.S.C. 15325. This exemption is related to advertising. Essentially, it allows EAC to contract without advertising the solicitation for the contract as required by 41 U.S.C. 5. The Commission has determined that this exemption does not apply to the competition requirements of the FAR. Furthermore, EAC advertises its solicitations for contracts using its web site, GSA E-Buy, and/or FedBizOps because it would be difficult, if not impossible, to compete a contract without advertising its availability.

The second exception to the FAR gives EAC authority to hire experts and consultants pursuant to 5 U.S.C. 3109(b). (See Section 204(b) of HAVA, 42 U.S.C. 15324(b)). The provisions of 5 U.S.C. 3109(b) create a quasi-employment situation. Contracts with these experts and consultants are not FAR-based contracts. In fact, the provisions of the FAR specifically refer the user to the Human Resources division of the agency for information on these types of "contracts." Persons hired under the expert and consultant provisions are counted as full-time equivalents (FTEs) of the agency that hires them.

EAC's contracting policy covers contracting under each of the provisions mentioned above. It establishes an in-house contracting officer and also provides for the use of a third-party agency's contracting officer. EAC currently uses the services of GovWorks, a division of the Department of Interior, which provides contracting services to government agencies under the provisions of the Economy Act.



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The procedure to select working or peer review group members is established as a part of the particular contract. Generally, this means that the contractor and EAC will work together in assembling candidates and that the EAC approves the final list of working or peer review group members. The contractor then proceeds to work with the group members under the governing contract. An exception to this rule is the work that is being done for EAC by the National Academies of Science on voter registration databases. This is a peer reviewed study, and as such, the National Academies selects its committee to conduct the study.

EAC's first effort is to use consultants and peer review group members who are nonpartisan. However, in the realm of elections, it is always difficult to identify persons who have not expressed or declared a political position. Thus, EAC is often required to use bi-partisan consultants and peer review members. This approach fairly balances the political affiliations and philosophies of the members. An example of this approach was EAC's use of bi-partisan consultants to conduct its voting fraud and voter intimidation study.

2. Who is responsible for reviewing the methodology of consultants?

EAC employs a full-time research director, who is responsible for managing research projects, including assessing the research methodology employed by each contractor.

3. What is the role of the Commissioners in dispensing official positions and advice to States and local election officials? What is the role of the General Counsel?

EAC is directed by HAVA to serve as a national clearinghouse of information on the administration of Federal elections; to adopt Voluntary Voting System Guidelines for the testing and certification of voting systems; to develop a program for testing and certifying voting systems; to establish a program for the accreditation of laboratories to test voting systems; to conduct studies and research as directed by HAVA; to provide funding authorized by HAVA and appropriated by Congress for the improvement of election administration under HAVA; to provide information and training on the management of payments and grants provided under HAVA; and to develop and carry out the HAVA College Poll Worker Program. (See HAVA Section 202, 42 U.S.C. 15322; HAVA Section 231, 42 U.S.C 15371; HAVA Sections 241 – 246, 42 U.S.C. 15381 – 15386; and HAVA Section 251, 42 U.S.C. 15401).

By focusing on the guidance in HAVA, EAC is able to advise, inform and instruct the States on ways to improve the administration of their elections. In addition, as the awarding agency for HAVA requirements payments, EAC has the responsibility of answering States' questions regarding the use of HAVA funds and, in some cases, pre-approving expenditures of HAVA funds. (See OMB Circular A-87; OMB Circular A-102 (Common Rule)).

These matters raise questions and issues from the States. Some of these questions and issues are clearly covered by existing law and merely require the application of the statute,



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regulation or existing policy to the facts of the specific situation. In cases where EAC has no discretion, we have asked our General Counsel and program staff to take on the administrative duty of responding to questions that involve interpretation and applicable of existing law. Examples of these types of questions can be found in the [Frequently Asked Questions](#) document concerning the use of HAVA funds, which is available on EAC's Web site, www.eac.gov. Regarding issues not clearly covered by existing law or that require a policy decision, EAC considers these issues through its formal voting procedures. Examples are contained in the [advisories and guidance](#) that have been issued by the Commission. These documents are also available on EAC's Web site.

4. How does EAC consult with Department of Justice (DOJ) lawyers about federal election issues? Is such official consultation conducted on a bipartisan basis? When official meetings are held to discuss federal election issues, have all Commissioners been involved? If not, why not?

As directed in HAVA, DOJ has two seats on the EAC Board of Advisors. (See HAVA Section 214; 42 U.S.C. 15344). In addition, HAVA directs that DOJ enforces HAVA. (See HAVA Section 401; 42 U.S.C. 15511). Last, DOJ and the respective U.S. Attorneys serve as counsel to the United States Government in actions in which agencies of the U.S. government, such as EAC, are parties.

HAVA directs DOJ personnel to serve in a representative capacity on the EAC Board of Advisors, and DOJ makes the determination who serves in these capacities. There is at least one in-person meeting per year of the Board of Advisors, which is open to the public. In addition, EAC conducts on-line virtual meetings for Board of Advisors members to post comments regarding EAC projects and guidance. DOJ representatives, as well as the other 35 members of the Board of Advisors, participate and share their opinions with EAC.

Contact with DOJ regarding enforcement issues and its representation of EAC is primarily handled at a staff level by EAC's Office of General Counsel. DOJ makes EAC aware of enforcement actions against States that do not comply with HAVA. Similarly, EAC consults with DOJ prior to issuing advice or guidance that would impact DOJ's enforcement of HAVA. For example, EAC consulted with DOJ regarding its guidance on statewide voter registration databases. In addition, DOJ has inquired about using some of EAC's research products in its enforcement actions. An example of that interaction would include actions by DOJ against jurisdictions that do not comply with the language minority provisions of the Voting Rights Act. DOJ can offer these jurisdictions EAC's glossary of election terms to use as a tool in coming into compliance. Likewise, EAC's poll worker recruitment materials can be of assistance to jurisdictions that need to recruit foreign language speaking poll workers and assistants.



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Over the past few years, there have been few policy meetings between EAC Commissioners and DOJ. When those meetings have occurred, all Commissioners have been invited to attend and did attend, when they were available.

- 5. In your year as Chairwoman/Vice-Chairwoman, have you been able to identify any management practices or procedures which, if implemented, would help to ensure non-partisan decision making? If yes, what are the procedures or practices you expect to implement? Please describe in detail the steps the EAC has already made with the bipartisan commission to oversee EAC research, contracting procedures, and EAC operation.**

EAC has implemented bipartisan subcommittees (two Commissioners each) to oversee research, the National Voter Registration Act (NVRA), and the budget. The research subcommittee reviews ongoing as well as proposed research activities. Similarly, the NVRA subcommittee plans activities under the NVRA and considers questions related to the National Voter Registration Form and NVRA. Last, the budget committee reviews the current operations budget to track the allocation of funds and prepares the budget request for the upcoming fiscal years.

Also, we have moved most of EAC's contracting activities to a third-party agency, GovWorks. They serve as the contracting officer and work with the cost proposals submitted by the bidders as well as the technical review of proposals by EAC staff to select a winning bidder on each contract. These activities are all conducted at the staff level. EAC Commissioners are not engaged in selecting winning bidders.

EAC has also instituted a practice of posting its research products for comment by its Standards Board and Board of Advisors prior to final determination on those projects. EAC recently posted both its Poll Worker and College Poll Worker recruitment and training guides through the virtual meeting rooms of the Standards Board and Board of Advisors. Members posted comments to the draft documents. These comments were visible to the public and the public could send messages to the members of the Standards Board and Board of Advisors regarding the documents or their comments.

Vice Chair Rodriguez has also asked that EAC make greater use of its public meetings and rely less on its written voting procedures. All written votes are available to the public, but Commissioner Rodriguez believes that consideration of all but the most rote and ministerial of actions should be conducted in a public meeting.



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6. a. **You testified during the hearing that the EAC is not fully complying with the Administrative Procedures Act (APA). What steps is the EAC taking to comply with the APA and other applicable federal administrative laws and policies?**

In supplemental testimony submitted on August 8, 2007, EAC clarified its response to the questions posed by Congresswoman Lofgren as follows:

The last question that requires clarification is the question posed by Chairwoman Lofgren regarding the familiarity of EAC with the Administrative Procedures Act (APA). We responded that EAC was not following the APA as closely as we should be. We must clarify this response in light of the extent to which the APA applies to EAC and to clarify which portions of the APA that EAC has not yet complied with. In this discussion, it is critical to note that EAC has very limited "rule making authority." EAC's rule making authority is limited to its responsibilities under the National Voter Registration Act. See HAVA Section 209, 42 U.S.C. 15329.

The APA includes rule making and adjudication procedures as well as provisions otherwise referred to as the Freedom of Information Act (FOIA), the Privacy Act, and the Government in the Sunshine Act. As was mentioned above, EAC has very limited rule making authority. EAC also does not sit as an adjudicatory body or issue any sort of license. As such, the rule making provisions apply only in those cases where EAC has rule making authority, specifically in promulgating rules under the NVRA. EAC has not yet acted to promulgate any rules under the NVRA. In contrast, HAVA specifies several processes that apply to the various forms of advice, guidance and guidelines that it is to issue to the States. The process for adopting the voluntary voting system guidelines is set forth in Section 222 of HAVA; the process for adopting guidance regarding Title III implementation is stated in Section 312 of HAVA; and the process for adopting best practices is specified in Section 242 of HAVA. EAC follows each of these processes in adopting each of these types of guidance. In addition to these responsibilities, EAC, as the awarding agency for HAVA funds, follows OMB's published circulars in providing pre-approval and information to the States regarding appropriate uses of HAVA funds. EAC has also followed the provisions of FOIA, the Privacy Act and the Government in Sunshine Act in terms of setting and noticing meetings, providing information to persons who request that information, and protecting the privacy of its employees and other individuals about whom EAC may possess such personal information.

EAC has not yet issued administrative regulations under the APA regarding its FOIA procedures, Privacy Act information, or public meetings. However, EAC is abiding by the principles of each of these provisions. EAC has not provided administrative regulations to inform the public, as an example, on how to request information under FOIA. EAC's Web site currently informs the public how to submit FOIA requests, and we are currently working to develop FOIA regulations and a FOIA reading room.



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- b. You testified during the hearing that the Commissioners rely on staff attorneys a great deal to comply with the Administrative Procedures Act (APA). What steps is the EAC taking to comply with the APA and other applicable federal administrative laws and policies? How many staff attorneys provide input on these matters? Please describe their professional qualifications with respect to administrative law.**

In response to the question posed by Congresswoman Lofgren, EAC identified that it relies upon its staff to assist with compliance with the Administrative Procedures Act. EAC currently has assigned FOIA responses to a FOIA Officer. In addition, one staff person is primarily responsible for drafting and submitting all notices of public meetings to the Federal Register, including public meetings of the Commission, the Board of Advisors, the Standards Board and the Technical Guidelines Development Committee. Where these persons have questions regarding the application of the APA, FOIA, the Government in Sunshine Act or any other administrative regulation or provision that EAC must comply with, these persons refer their questions to the Office of General Counsel. There are two attorneys currently employed in that division. Both have been admitted to the bar of at least one State, in some cases more than one State. The two attorneys have approximately 20 years of combined experience in the practice of law. Mr. Gilmour has practiced his entire career with the United States government and has handled administrative matters as well as other government practice matters. Mrs. Hodgkins has served in both State and Federal government for seven years handling matters related to administrative procedures, government transparency and regulatory responsibilities.

- 7. What are the respective roles of the EAC and DOJ in administering the Help America Vote Act (HAVA)? Are there procedures or policies in place that define each agency's respective roles?**

The roles of EAC and DOJ are set forth in HAVA. EAC is charged under HAVA with a number of activities related to the administration of the Act, including:

- o Distributing funding to States for the implementation of HAVA mandates (See HAVA Sections 101, 102, 251; 42 U.S.C. 15301, 15302 and 15401)
- o Monitoring and auditing the use of HAVA funds (See HAVA Section 902; 42 U.S.C. 15542)
- o Establishing and updating a set of voting system guidelines (See HAVA Section 222; 42 U.S.C. 15362)
- o Establishing a program for the testing and certification of voting systems by accredited laboratories (See HAVA Section 231; 42 U.S.C. 15371)
- o Providing guidance to the States regarding the meaning of Title III requirements (See HAVA Section 311; 42 U.S.C. 15501)



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- Conducting research concerning certain required topics and other discretionary topics related to the administration of elections (See HAVA Sections 241 – 246; 42 U.S.C. 15381 - 15386)
- Serving as a clearinghouse of information regarding the administration of Federal elections (See HAVA Section 202; 42 U.S.C. 15322)

Similarly, the role of DOJ is set out in Title IV of HAVA. Section 401 provides as follows:

The Attorney General may bring civil action against any State or jurisdiction in an appropriate United States District Court for each declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 301, 302 and 303.

In addition, DOJ is given a role in approving the administrative complaint procedures that HAVA required that all States adopt prior to requesting funding under Section 251 of HAVA.

While EAC has sought a Memorandum of Understanding between it and DOJ for several years, there has never been agreement on such a document. EAC's primary concern in having such a document was having a more open and candid line of communication with DOJ regarding its actions under Section 401. While EAC possesses and can obtain a great deal of information regarding the States' compliance with Title III of HAVA, EAC is rarely consulted prior to action being taken by DOJ, including in circumstances wherein the action taken by DOJ will impact EAC's ability to effectively monitor and audit HAVA funding.

EAC does not possess and cannot speak to any policies or procedures that are in place at DOJ regarding their role and how they implement their responsibilities under HAVA. Any such questions should be directed to DOJ, as they possess sole knowledge of any applicable policies, procedures or regulations.

8. Whose role is it to issue advisory opinions on HAVA and the National Voter Registration Act?

As in the previous question, EAC can speak only to its role and its authorities under HAVA and NVRA.

EAC is required by HAVA to issue guidance regarding the provisions of Title III of HAVA, specifically the voting system requirements, provisional voting requirements, polling place signage requirements, and requirements for the establishment and use of a statewide voter registration list. (See HAVA Section 311; 42 U.S.C. 15501). This guidance is by statute, strictly **voluntary**. EAC does not have the ability to enforce these guidance statements on



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the States. Similarly, EAC is called upon to provide research and best practices on a variety of different election administration topics. These research pieces are informative, but not mandatory. Thus, EAC may give its "advice" to the States on the meaning of HAVA, but it serves as just that, "advice," not enforceable regulation.

Other provisions of law coupled with HAVA's funding provisions give EAC the authority and responsibility to determine the appropriate uses of HAVA funds, to monitor the use of those funds and to recoup any misspent funding. (See OMB Circulars A-87, A-102, A-133; HAVA Section 902, 42 U.S.C. 15542). Thus, information provided to the States regarding the appropriate uses of HAVA funds are mandatory and enforced via the auditing authority given to EAC.

Under the NVRA, as amended by HAVA, EAC is required to provide information to the States on the implementation of NVRA. See NVRA Section 9; 42 U.S.C. 1973gg-7. Furthermore, EAC is required to maintain the National Voter Registration Form for use by the States.

DOJ enforces both HAVA and NVRA. Thus, ultimately, it will be the legal actions of DOJ and the decisions of the courts that determine definitively, for example, what constitutes a HAVA-compliant voting system or when a State or State agency is failing to appropriately implement the voter registration provisions of NVRA.

9.
 - a. **How involved is DOJ in the work of the EAC? Have the two agencies established any system or procedure for interagency communication?**
 - b. **How involved is DOJ in the work of the EAC and is there any system or procedure for interagency communication? Have the two agencies established any system or procedure for interagency communication?**

As in our response to question 4, our interaction with DOJ is as proscribed in HAVA. See also our response to question 7.

10. **Does the DOJ have a greater role on the Advisory Board than other members? Can you give examples of other members offering input? How was this input taken into consideration? Does the EAC have procedures in place to allow Advisory Board members to offer input?**

Section 214 of HAVA established two seats for DOJ on EAC's Board of Advisors. For your convenience, listed below are the organizations represented on the Board of Advisors, per HAVA.

(a) In general. The Board of Advisors shall be composed of 37 members appointed as follows:

- (1)** Two members appointed by the National Governors Association.



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- (2) Two members appointed by the National Conference of State Legislatures.
- (3) Two members appointed by the National Association of Secretaries of State.
- (4) Two members appointed by the National Association of State Election Directors.
- (5) Two members appointed by the National Association of Counties.
- (6) Two members appointed by the National Association of County Recorders, Election Administrators, and Clerks.
- (7) Two members appointed by the United States Conference of Mayors.
- (8) Two members appointed by the Election Center.
- (9) Two members appointed by the International Association of County Recorders, Election Officials, and Treasurers.
- (10) Two members appointed by the United States Commission on Civil Rights.
- (11) Two members appointed by the Architectural and Transportation Barrier Compliance Board under section 792 of title 29.
- (12) The chief of the Office of Public Integrity of the Department of Justice, or the chief's designee.
- (13) The chief of the Voting Section of the Civil Rights Division of the Department of Justice or the chief's designee.
- (14) The director of the Federal Voting Assistance Program of the Department of Defense.
- (15) Four members representing professionals in the field of science and technology, of whom—
 - (A) one each shall be appointed by the Speaker and the Minority Leader of the House of Representatives; and
 - (B) one each shall be appointed by the Majority Leader and the Minority Leader of the Senate.
- (16) Eight members representing voter interests, of whom—
 - (A) four members shall be appointed by the Committee on House Administration of the House of Representatives, of whom two shall be appointed by the chair and two shall be appointed by the ranking minority member; and
 - (B) four members shall be appointed by the Committee on Rules and Administration of the Senate, of whom two shall be appointed by the chair and two shall be appointed by the ranking minority member.

Each member is invited to attend and participate in all meetings (whether in person or via virtual meeting room) of the Board of Advisors. All members have equal votes by the charter and bylaws of the Board of Advisors. Thus, every member of the Board of Advisors has an equal role and equal opportunity to participate.

The minutes of each Board of Advisors meeting, all of which are public, as well as postings from their virtual meetings are available on EAC's Web site, www.eac.gov. These minutes and postings capture comments from each of the Board of Advisors members, as well as information about the attendance and participation of the members.



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11. Is there typically a nondisclosure provision in EAC contracts that prevents consultants from discussing their work? If not, why was there such a provision in the fraud and intimidation contracts?

Nondisclosure of unreleased material is a standard clause under the Federal Acquisition Regulation. (See clause 52.227-14 and 52-227-17). These types of clauses are regularly incorporated in government contracts and EAC has made use of this or a similar clause in both its FAR-based contracts. Similarly, contracts for experts and consultants that create a special employment situation bind these consultants to ethics regulations applying to Federal government employees, including 5 C.F.R. 2635.703 that prohibits the use of nonpublic information. Clauses memorializing this requirement are included in EAC's expert and consultant contracts.

12. Who decides when an EAC study is to be released?

The Commission makes the determination on when and if a study is to be released. Because of its small size, EAC must contract for research work. Each of these is a "work for hire" for EAC and the contractor does not retain any of the intellectual property or rights to the work. The research and reports on the research become the property of the EAC. As such, it is EAC's decision as to when and in what format these works will be released. Such decisions are made by vote of the Commission. As examples, EAC voted on December 7, 2006 to release its Election Crimes report, which grew out of a study of voting fraud and voter intimidation. Similarly, on July 19, 2007, EAC voted to release its Poll Worker and College Poll worker recruitment and retention guides.

13. Why would and to what extent does the EAC believe that it may alter the studies and conclusions of its consultants? Is the decision to edit a consultant's study made by vote of the Commissioners? If not, who makes the decision and on what basis and authority?

As mentioned in the responses to Questions 11 and 12, EAC follows the terms of its contracts and the FAR throughout the process of managing research contracts. In addition to its responsibilities to adhere to the terms of the contract and the FAR, EAC has a responsibility to ensure that research it adopts is accurate and is validated by supporting data. For example, the voting fraud and voter intimidation contract specified that the consultants provide a roadmap for future study of these important issues. The contractors provided conclusions, which were not asked for under the contract. In addition to this out-of-scope activity, the conclusions or "Common Themes" Interviews" were based upon interviews with only 24 people. Therefore, EAC did not adopt such conclusions in the absence of a large body of thoroughly vetted data to back up those conclusions.



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EAC believes that the use of the bipartisan research subcommittee will help to better manage research contracts so that the contractor and EAC will better understand the requirements of the contract. Bipartisan oversight will improve the quality of products that EAC receives, will diminish any need to take corrective action to any of those draft reports, and remove even the appearance of partisan influence.

14. If the EAC Commissioners or staff have concerns about the scope or the findings of research a consultant is conducting while a research project is progressing, who is responsible for communicating that to the consultants? What procedures are in place for reviewing an ongoing research project and communicating any concerns?

A contracting officer's technical representative (COTR) assigned to each project by the contracting officer. The COTR is primarily responsible for interacting with the contractor. However, only the contracting officer has the authority to communicate contract changes to the contractor. For example, if the COTR believes that additional work requiring additional funds is necessary, the COTR must obtain the approval of the contracting officer before assigning the contractor to perform the additional work. However, in all instances, the COTR or the contracting officer can communicate with the contractor regarding the quality, timeliness and content of the contracted-for product(s).

In most, if not all, of the contracts that have been let by EAC, there are also requirements for the contractor to brief the Commissioners regarding their work. This is generally conducted in person and gives the Commissioners the opportunity to react to the progress and content of the work prior to the completion of the project. Again, the Commissioners are not authorized to make changes that will result in the requirement of additional funding being assigned to the contract or for work that is outside of the scope of the original contract.

15. If questions exist as to the accuracy of consultant's data and conclusions, what is the EAC's standard of evidence? Does the Commission check with consultants about their evidence? Does the EAC develop evidence in reaching contrary conclusions?

Each contract requires contractors to provide EAC with all data that they have collected. EAC reviews this data to ensure that the conclusions provided are supported by the data that was submitted with the project. For example, if a contractor was asked to compile a table of requirements for counting votes in each State, EAC would conduct a review of the sources of that data against the table that the contractor provided. If the data was not accurate, the contractor would be asked to correct the inaccuracies. In addition, EAC uses peer review or working groups as a tool to check a contractor's data and resultant conclusions. These groups are particularly helpful when the data is statistical or regards a subject matter with which EAC has little expertise. As in the example cited earlier, the compiled table may be sent to a working group of State election officials to verify the accuracy of the information.



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The Board of Advisors and the Standards Board also provide input regarding research activities. See the EAC Web site to view some of the resolutions adopted by these entities regarding EAC research.

- 16. What is the EAC's policy for instances in which outside advocates and political activities attempt to influence the direction of ongoing research projects, or the individuals working on them? Do commissioners and staff communicate and consult with such outside persons regarding research projects while they are still being undertaken? Does the Commission have a general policy on ex parte communications?**

EAC has an ex parte communications policy that was adopted at its May 2006 public meeting and is available on EAC's Web site. This policy is intended to avoid "off-the-record" communications between decision makers and persons who represent interested parties in "particular matters" or events that will impact the financial position of the interested parties. Several examples of such "particular matters" are listed in the policy, including requests by States for funding, requests for accreditation of a laboratory, and voting systems that undergoing review for certification. If an inadvertent communication occurs, the decision-maker is required to disclose that communication and make it available for the record for the final decision making process.

While a "particular matter" does include contracting, it is not clear that the circumstance included in the question would be covered by this policy. The impact on the financial position of the contractor would occur at the time the contract is awarded or terminated. Only the contracting officer can award or terminate a contract. The Commission has delegated its contracting authority through its contracting policy. As such, the Commissioners are not decision makers in awarding or terminating contracts. Furthermore, the contact or communication that is included in this question is related to contact from a third party (neither the EAC nor the contractor) regarding an ongoing piece of research. Many such communications are required by HAVA, including comments or coordination with our Standards Board and Board of Advisors. These comments would likewise not be covered by the ex parte communications policy as they are required communications in the process of adopting a piece of research.

- 17. Why did the EAC delay its study concerning voter identification laws? On what grounds did the EAC conclude that the study's methodology was flawed? Who reviewed the methodology?**

Primarily the delay was due to competing priorities and a lack of both staffing and financial resources. EAC received Eagleton's draft report in June 2006, and also around this time EAC began receiving parts of the Voting Fraud and Voter Intimidation and Provisional Voting report. Also in July, the National Association of State Election Directors terminated its voting system qualification program, which meant EAC immediately had to launch its



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interim laboratory accreditation and pre-election certification programs for the November 2006 elections. (The National Institute of Standards and Technology (NIST) had informed EAC it would not deliver its voting system test lab recommendations until the following year.)

EAC also had concerns about the data, methodology and conclusions in the draft report, so it was important to take the necessary time for the staff to address these concerns.

EAC's concerns over the data, methodology and conclusions were based on the data that was analyzed, the statements of the peer review group and the recommendations of the working group. As a part of the Eagleton contract and work plan, they proposed and used a peer review group consisting of the following members:

- R. Michael Alvarez, Professor, California Institute of Technology;
- John C. Harrison, Professor, University of Virginia School of Law;
- Martha E. Kropf, Assistant Professor, University of Missouri-Kansas City;
- Daniel H. Lowenstein, Professor, University of California at Los Angeles School of Law;
- Timothy O'Rourke, Dean, Salisbury University;
- Bradley Smith, Professor, Capital University Law School;
- Tim Storey, Principal, National Conference of State Legislatures Program; and
- Peter G. Verniero, Former New Jersey Attorney General.

The Eagleton Peer Review Group met on three separate occasions via conference call. During those calls, the Peer Review Group provided Eagleton with feedback on both of their research products on provisional voting and voter identification.

After receiving Eagleton's first draft on its voter identification work, EAC was concerned about the data and analysis and empanelled a separate working group. This group consisted of New York University Professor Jonathan Nagler, MIT Associate Professor Adam Berinsky, and University of Arizona Associate Professor Jan Leighley. These working group members were provided the draft report as well as the data on which the report was based. On May 11, 2006, EAC Research Director Karen Lynn-Dyson conducted a one-hour conference call with the EAC working group and project staff from the Eagleton Institute of Politics, including Tim Vercelloti and Tom O'Neill. In addition, several members of the Eagleton Peer Review Group also participated in the conference call.

Participants engaged in a high-level, technical discussion of the statistical techniques that were employed to analyze the data. The working group members expressed concern about the multi-category, ordinal variable that was used. This variable is represented by five levels of voter identification requirements: state your name, sign your name, non-photo identification, photo identification and affidavit. The working group members were concerned that one or more of the categories of this single variable was based on unrealistic



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assumptions. The working group members suggested dividing this single, ordinal variable into individual dummy variables to represent each of the levels of voter identification.

This, in addition to questions that EAC had concerning the use of extrapolated census data, EAC determined it was our responsibility to take time to review the project before acting on it. Ultimately, EAC believes that it is critical that we adopt projects in which we are comfortable that the data is accurate and that the analysis and conclusions from those data are reasonable.

- 18. The EAC has not kept Congress apprised of important developments relating to its statutory responsibilities. For example, when EAC withheld accreditation to CIBER, one of the few companies that test and certify our nation's voting machines, in August 2006, Congress was not officially notified and only learned of the action in a front page article of the New York Times in January 2007. How does EAC plan to improve its communication with Congress?**

EAC must do a better job of communicating with its stakeholders, including Congress. In this particular instance, however, the January 4, 2007 headline of the *New York Times* article incorrectly stated that EAC barred CIBER, when in fact CIBER was still in the process of applying to become an interim accredited voting system test lab. EAC had already announced and notified its stakeholders that two other labs had received interim accreditation, but no decision had been made regarding CIBER.

Since that time, EAC terminated CIBER's application to become an EAC interim accredited test lab. EAC posted information about its vote to terminate CIBER's application on the Web site and notified more than 900 stakeholders, including Congressional staff, about this action.

Interim accredited labs were necessary due to the fact that NASED shut down its program in the summer of 2006, and NIST informed EAC it would not deliver a list of recommended labs until the end of 2006. To ensure States were still served during this six month gap, EAC announced that it would invite the three labs – CIBER, Inc., Wyle Laboratories, and SysTest Labs – that worked with NASED to apply for interim accreditation under EAC's program.

EAC worked hard to notify the public about the interim accreditation process, starting with announcing the interim program and the three labs that would be invited to participate at a public meeting back in 2005. A summary of EAC's notification activities follow:

August 2005 Public Meeting -- The commissioners received a staff recommendation outlining the details of the interim accreditation program. Staff recommended that the three laboratories previously accredited by NASED – CIBER, SysTest Labs, and Wyle Laboratories – be allowed to apply for interim accreditation.



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December 2005 -- EAC began accepting applications for a limited interim accreditation program. As stated in the letters, the purpose of the interim accreditation program was to provide accredited laboratories that could test voting systems to Federal standards, until such time as NIST/NVLAP was able to present its first set of recommended laboratories. This accreditation was limited in scope to the 2002 Voluntary Voting System Standards and required the laboratory to apply to the NVLAP program with the intent to receive a permanent accreditation. The letters also sought a variety of administrative information from the laboratories and required them to sign a Certification of Laboratory Conditions and Practices. This certification required the laboratories to affirm, under penalty of law, information regarding laboratory personnel, conflict of interest policies, recordkeeping, financial stability, technical capabilities, contractors, and material changes.

In order to accredit a laboratory, even on an interim basis, EAC needed to contract with a competent technical expert to serve as a laboratory assessor. EAC sought a qualified assessor with real-world experience in the testing of voting systems. The contractor reviewed each of the laboratories that applied. The review was performed in accordance with international standards, the same standards used by NVLAP and other laboratory accreditation bodies. This standard is known as International Standard ISO/IEC 17025, *General Requirements for the Competence of Testing and Calibration Laboratories*. In addition, the EAC assessor (who also currently serves as a NVLAP assessor) applied NIST Handbooks 150, *Procedures and General Requirements* and NIST Handbook 150-22, *Voting System Testing*.

As announced at the August 2005 public meeting, CIBER, SysTest Labs, and Wyle Laboratories applied for accreditation under the interim program. Each, as required, had previously received a NASED accreditation. EAC's assessor visited each of the labs and conducted a review consistent with the standards noted above. The assessor reviewed laboratory policies, procedures and capabilities to determine if the laboratories could perform the work required. Laboratory assessments do not make conclusions regarding past laboratory work product.

August and September 2006, SysTest Laboratories, L.L.C., and Wyle Laboratories, Inc. receive interim accreditation -- the assessor's reports and EAC action regarding these laboratories are available on the EAC Web site, www.eac.gov.¹ EAC published on its Web site information regarding its decision on accreditation. This notice provided brief background on the interim

¹ Note: The Wyle and CIBER assessments were completed as a joint report. The two labs have a cooperative agreement to work together in testing voting systems (Wyle performing hardware testing and CIBER software testing).



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accreditation process, starting with the reminder that three previously NASED accredited laboratories were invited to apply to the program, including information on the program's requirements and limitations, and ending with the identity and contact information of the two laboratories accredited. Information was also electronically forwarded to EAC's list of stakeholders via e-mail. The EAC stakeholders e-mail list includes almost 900 election officials and interest groups, nationwide. Staff members for EAC oversight and appropriations committees are included in this list of stakeholders.

September 21, 2006 Public Meeting -- EAC's Executive Director announced that two of the three labs -- SysTest and Wyle -- that applied have received interim accreditation. This meeting was Web cast and the minutes are available at <http://www.eac.gov/docs/FINAL%20St%20Louis%20minutes.pdf>.

October 26, 2006 Public Meeting -- The two interim accredited laboratories testified at EAC's nationally televised public meeting.

June 17, 2007 Public Announcement -- EAC announced that it had terminated CIBER's application to become an interim accredited test lab. Copies of the letter that was sent to CIBER and the press release concerning the vote taken by the Commission are available on EAC's Web site, www.eac.gov. CIBER has applied to NVLAP to become accredited to the 2005 VVSG under the full certification program. EAC will await action and recommendation by NVLAP prior to any further consideration of CIBER as an EAC-accredited laboratory.

Notwithstanding the opportunities EAC took both in public meetings and through Web postings and mass emails to announce which labs had received interim accreditation, EAC recognizes that it should have continued to remind stakeholders that one lab was still working to gain interim accreditation. In the future, EAC will take no detail for granted when it comes to informing Congress and the public about this important process. Also, EAC will continue to make information available to members of Congress and their staff through its Web site, through its monthly newsletters, through press releases, and through updates on the various EAC programs, as well as through personal phone calls, when necessary.

19. What resources are needed for the EAC to meet the Commission's goals and priorities for the upcoming year as well as implement some of the improvements discusses (sic) throughout the hearing?

EAC's budget request for 2008 is \$15,467,000. A copy of that request has been attached as Appendix 1 to these questions for your review and convenience. That funding is necessary to continue operations and to support the work of our various programs, including the work of NIST on the Voluntary Voting System Guidelines and test methods to accompany those guidelines. This amount has been approved or exceeded by both the full House of



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Representatives and the Senate Appropriations Committee. Assuming that this level of funding is maintained, EAC will be satisfactorily funded to successfully continue its operations.

There are several pieces of legislation pending in Congress that if passed would require additional funding and staffing resources at EAC. H.R. 811 would impose significant new requirements on EAC, including distributing and monitoring additional funding for both the upgrade of voting systems as well as for post-election audits. While funding was considered for these programs, there was no funding consideration for EAC, the agency that would be required to administer most of the funding and the implementation of these new requirements. Senators Clinton and Feinstein have introduced legislation that like Mr. Holt's bill would increase responsibilities on EAC without increasing funding for EAC.

20. What is the status of the Inspector General's report on the EAC's consultant contracting practices?

EAC's Inspector General is currently conducting a review of EAC's activities related to the Voting Fraud and Voter Intimidation study as well as the Voter ID study. In addition, the EAC Inspector General is conducting internal reviews of processes, including those related to contracting. Both reviews are ongoing at this time.

21. Why has the EAC delayed the release of these guidelines? When will they become available not only to DOD but to Congress as well? What steps are being taken to ensure that the guidelines encourage more voter participation than the IVAS projects of 2004 and 2006?

This question refers to guidelines for an electronic means of voting for military members and overseas citizens that was required as a part of the Defense Authorization Act of 2005. This Act instructed EAC to work with the Federal Voting Assistance Program (FVAP) of the Department of Defense to develop standards for some electronic means of voting for military and overseas citizens. The Act was not clear on whether it referred to an actual voting machine (through which these constituents would cast votes and the votes would be counted) or merely an electronic means of transferring the ballots that they received from their local voting jurisdictions.

FVAP has already spent nearly \$30 million on a project called SERVE. This project intended to build an on-line voting system, but it was scrapped after criticism by a group of academics for its alleged security flaws. EAC sought and was finally (after many months of repeated requests) given an embargoed copy of the final report on the SERVE project. FVAP then instituted a program called IVAS 2004, and later IVAS 2006. This system was intended to be a transmission system for ballots that were produced by the local election jurisdictions. Essentially, its goal was to cut down on the time it takes to send and receive ballots, but was not intended to actually count the ballots.



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With this information in hand, EAC approached the Technical Guidelines Development Committee (TGDC) – its advisory committee engaged in the development of voting system standards – to have this section added to their consideration of the VVSG. Carol Paquette made a presentation on behalf of the EAC regarding this request at the [September 2005 meeting of the TGDC](#). The TGDC declined to include this in their work on the VVSG, as they believed that the VVSG already contained sufficient standards to cover an Internet-based voting system. It must be noted at this point that the Federal government already has standards for the secure transmission of data using the Internet as a part of the Federal Information Security Management Act (FISMA).

With no success in having this piece of work added to the VVSG, EAC then turned to the National Institute of Standards and Technology (NIST) to discuss having them perform this work separate and apart from their work supporting the TGDC on the VVSG. NIST declined citing that they did not have sufficient human resources available to undertake that type of project at that time. At this point, EAC determined that there was too much variance between the two concepts (an on-line voting machine and an Internet tool to facilitate the transmission of ballots) to undertake creating standards without additional research and clarification of the process.

EAC advertised an RFP for work to be performed to research the current status of the laws and procedures in the various States to determine which system States could support under their current laws. Initially, there were no responses to the RFP. Thus, EAC re-issued the RFP in 2006 and it was awarded to Q2 Data, the contractor that is currently working on the project. This initial research project is expected to be completed before the end of the current fiscal year. However, this is just a first step to understanding what type of system the States can support and what standards should be adopted. From that research, EAC will have to assess the degree to which the future system is already covered by FISMA and whether the future system will be considered a true voting machine that will have to conform to all of the standards already in place in the VVSG.



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Appendix 1



U. S. ELECTION ASSISTANCE COMMISSION FISCAL YEAR 2008 BUDGET REQUEST

BACKGROUND

The United States Election Assistance Commission (EAC) is a bipartisan Commission created and authorized by the Help America Vote Act of 2002 (HAVA). The Commission consists of four members who are appointed by the President of the United States and confirmed by the United States Senate. There are currently three members serving on the Commission, Paul S. DeGregorio, Gracia Hillman and Donetta Davidson. There is one vacancy on the Commission.

HAVA charged EAC with assisting states in the implementation of certain election administration reforms. HAVA funded these election reforms and directed EAC to distribute and monitor the use of that funding. Congress has appropriated \$3.1 billion, all of which has been distributed to the states according to the requirements of the law. In addition, HAVA directed EAC to establish new guidelines for testing voting equipment, a means to test and certify voting systems against those guidelines, and a national clearinghouse for election administration information.

THE BUDGET IN SUMMARY

The requested appropriation for the EAC would provide salaries and related operating expenses necessary for the EAC to carry out the following functions and activities:

- Distribution and management of HAVA funding;
- Aiding in the improvement of election systems;
- Serving as a national clearinghouse on matters concerning the administration of elections for Federal office; and
- Providing guidance and assistance to State and local election officials on implementing HAVA's election reforms.

A complete description of the activities and programs in place at EAC as well as the intended use of funds and personnel in those programs is provided below.

In FY 2008, EAC is requesting a total of \$15,467,000. This amount represents a four percent decrease from its FY 2007 request. The following chart summarizes EAC's FY 2008 request in comparison to its FY 2007 request.



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**BUDGET AUTHORITY
\$(Thousands)**

	FY 2006 Projected	FY 2007 Estimated	FY 2008 Requested	FY 07 - FY 08 Change
Salaries and Expenses	\$14,058	\$16,908	\$15,467	-\$1,441
Total Budget Authority	\$14,058	\$16,908	\$15,467	-\$1,441

EAC ACTIVITIES AND PROGRAMS

Since its creation in 2004, EAC's role in assisting states with the implementation of HAVA has shifted. The first objective that EAC had in 2004 was to quickly and efficiently distribute the funding that Congress made available for election reforms to the states. In December 2005, EAC distributed the last requirements payments, under Section 251 of HAVA, to the states. Similarly, during this time, EAC sought to help states by providing advisories and guidance interpreting HAVA. In 2004 and 2005, EAC issued resolutions, advisories, and guidance on provisional voting, voting systems, and voter registration databases. EAC also issued various opinions on the appropriate uses of HAVA funds in 2004, 2005, and 2006.

Now that the funding has been fully distributed, EAC's role has changed to monitoring the appropriate uses of HAVA funds, through reports filed by the states as well as regular and special audits of the states. In addition to audit activities, EAC has shifted its focus to the ongoing programs that will improve the administration of elections for Federal office, including developing and updating voting system standards, accrediting testing laboratories, certifying voting systems, acting as a clearinghouse of information for states, and administering HAVA and the National Voter Registration Act (NVRA). As such, EAC has adopted the following strategic objectives to accomplish its mission and goals:

- Distribution and management of HAVA funding;
- Aiding in the improvement of election systems;
- Serving as a national clearinghouse on matters concerning the administration of elections for Federal office; and
- Providing guidance and assistance to State and local election officials on implementing HAVA's election reforms.

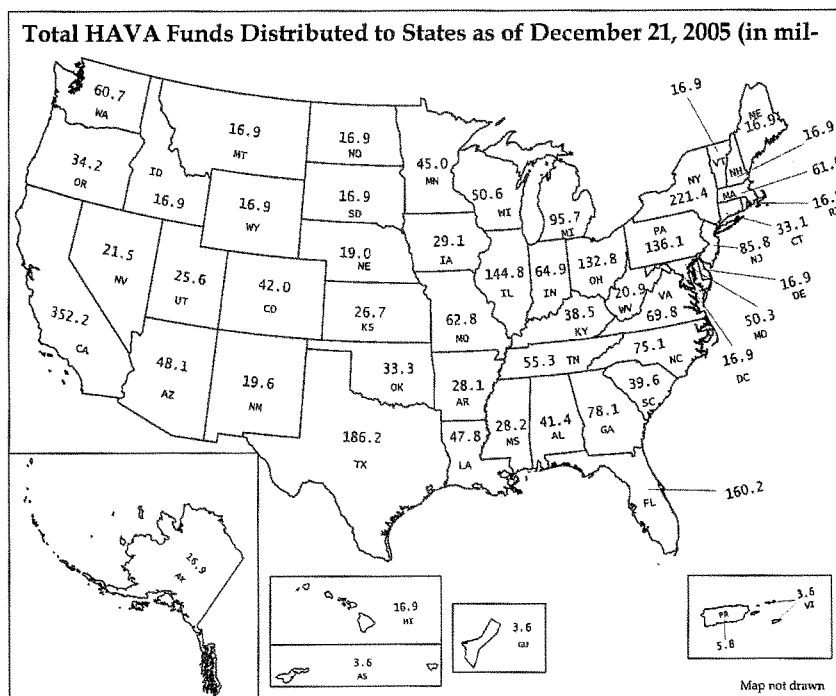
DISTRIBUTION AND MANGEMENT OF HAVA FUNDS

Congress appropriated \$3.1 billion to help states meet the requirements of HAVA and improve the administration of Federal elections. All HAVA sections 101, 102 and 251 funds appropriated have been distributed. The tables located on EAC's website ([Title II Requirements Payments & Early](#)



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Money) show the disbursement of funds by category and fiscal year. The graphic below shows the funds distributed to each state, including funds distributed by the Department of Health and Human Services under Section 261 of HAVA.



Responsible Stewardship of HAVA Funds

Now that the election reform funding has been distributed, EAC is working to ensure that states are good stewards of these Federal funds. To monitor the use of these funds, EAC issues guidance and answers questions on the appropriate use of HAVA funds, reviews reports submitted by the states and territories on expenditure of the funds, and conducts assessments and audits of the states.

Appropriate Uses of HAVA Funds

HAVA specifically limits the use of funds distributed under the various funding programs. These uses include purchasing voting equipment to replace punch card or lever voting systems, imple-



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menting provisional voting, purchasing equipment and software to build statewide voter registration databases, as well as various activities aimed at improving the administration of Federal elections. To clarify the appropriate uses of HAVA funds, EAC and the General Services Administration (GSA) applied OMB Circulars [A-87](#), [A-102](#), and [A-133](#). In addition, EAC provided guidance and information on the appropriate use of HAVA funds in response to questions from the states. Even with these resources, EAC must answer questions daily from the fifty states, four territories and the District of Columbia about allowable expenses under HAVA.

EAC requires that states, territories and the District of Columbia report their uses of HAVA funds. In the second quarter of each year, states report on their use of both Title I and Title II funds. The Title II report includes: (a) a list of expenditures for each category of activities described in Title III; (b) the number and types of voting equipment obtained with the funds; and (c) an analysis and description of the activities funded to meet HAVA requirements and how such activities conform to the state plan. The Title I report requires states to (1) disclose, in separate reports for Section 101 and 102 funds, the financial activity for the previous calendar year on a Standard Form 269; and (2) provide the same detail on the expenditures that is required for the reports on Title II requirements payments. EAC conducts a detailed review of each report to validate that the expenditure of funds met the requirements of HAVA and was in accordance with plans filed by the state or territory. The states' Title I and Title II reports are available to the public upon request.

Auditing

Section 902 of HAVA gives EAC and other HAVA granting agencies the authority to conduct regular audits of HAVA funds. EAC's audit activity is conducted through EAC's Office of the Inspector General (OIG), which currently consists of two types of reviews to determine if the states are exercising sufficient controls and using the funds distributed under HAVA for appropriate purposes. One is an assessment of procedures each state uses to administer and monitor HAVA funds, as well as a review of certain critical elements such as whether the state has maintained sufficient matching funds. Concurrently, OIG commissions audits of several states each year to more fully review the state's internal controls, processes, procedures, and transactions to ensure compliance with Government Auditing Standards.

In addition to EAC's regular audits, HAVA also provides for two other means of extraordinary audit authority – (a) funds are subject at least once during the term of the program to an audit by the Comptroller General; and (b) Section 902(b)(6) of HAVA allows EAC to conduct a “special audit” or “special examination” of the funds that are subject to regular audit under Section 902(b)(1). This special audit authority covers every HAVA program, including funds distributed under Title I, Title II, and programs administered by the Department of Health and Human Services. If EAC determines that a special audit is warranted, by vote of the Commission, EAC will refer the matter to the OIG for review.

Following the issuance of an audit report by the OIG, EAC management is required to resolve any audit findings, including recommendations for changes to policies and procedures and any findings



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that HAVA funds were misspent. This process requires EAC management to review the audit findings, develop monitoring programs for changes to policy or procedure, and quantify amounts of funding that are to be returned to the state's election fund or to the U.S. Treasury. Once an initial decision is made by the Executive Director, the determination is sent to the audited state. The state then has the option of appealing the decision to the Commission. Appeal can entail a paper review of the record of the audit or a combination of paper review and a hearing on the record. The decision of the Commission is final and binding on the state.

Investigations

When allegations are made concerning the misappropriation of HAVA funds, EAC is responsible for investigating those allegations through the OIG. The OIG does not currently employ an investigator, thus, when issues for investigation arise, EAC has contracted with other government agencies for the services of an investigator.

Current Financial and Human Resources Allocations

In FY 2006, EAC budgeted \$2.5 million for HAVA funds management activities. Of that, \$1.65 million was allocated to the OIG for auditing the use of HAVA funds and assessing state controls. This funding was used to employ one full-time employee to serve as the Inspector General, fund a Memorandum of Understanding with the Department of Interior for two detailed employees, conduct assessments and audits, and investigate allegations of misappropriation of HAVA funds. The OIG currently relies on the services of the Office of General Counsel for EAC for its legal reviews, opinions, and document preparation for subpoenas and other legal filings.

The remaining \$550,000 was budgeted for management activities such as reviewing reports submitted by the states, answering questions related to the proper use of HAVA funds, and reviewing states' indirect cost proposals. There are currently one and one-half full-time employees who manage the use of HAVA funds on behalf of EAC management. These employees review reports filed by states, answer countless questions from states on the appropriate use of HAVA funds, review audits conducted by state and other non-EAC auditors to resolve any findings, and resolve findings from EAC audits.

Financial and Human Resources Needs for OIG Operations and Management of HAVA Funds in FY 2008

In FY 2008, EAC anticipates allocating \$3.4 million and five full-time equivalents (FTE) to these functions.

Approximately \$1.9 million of this funding will be used by EAC to support the OIG. One and one-half additional FTE will be allocated to the OIG. One FTE will be added to provide additional assistance to both internal and external audits, either directly or by managing contracts with outside auditors. Regardless of whether audits are conducted in-house or out-of-house, the work of the auditor must be reviewed by another auditor under the Government Auditing Standards. In addition, OIG needs the assistance of a part-time attorney to provide legal advice as to the appropriate



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use of HAVA funds, opinions on the applicability of various laws to EAC and to the EAC funding programs, and to prepare and issue legal documents on behalf of the OIG. While this service has been performed by the Office of General Counsel for EAC in the past, this function, like the rest of OIG, should be independent from the management of EAC, and the need for this service is increasing with the rising number of audits that are being conducted both in-house and via contract. The remainder of the funds will be used to purchase investigative and audit support from other Federal agencies and to purchase audits. In addition, the contractor will be requested to perform internal, financial, and evaluations of the EAC's operations.

The remaining \$750,000 will support EAC management functions related to the distribution and management of HAVA funds. In FY 2008, EAC anticipates that it will need to continue reviewing reports filed by states, reviewing state and other non-EAC audits, resolving findings from EAC audits, and answering inquiries from states on the use of HAVA funds. In addition, with the conclusion of the HAVA Section 102 voting system replacement funding program, EAC anticipates that it will recoup funds from states that have either failed to replace their lever and punch card voting systems or failed to use the full amount of funding provided to the state for that purpose. According to HAVA, these funds must be redistributed to the states in the form of requirements payments under Section 251 of HAVA. This will require states to file new state plans, EAC to review and publish those plans in the Federal Register, and to calculate and distribute payments according to the formula set forth in HAVA. In addition, this program will continue to be responsible for the distribution of HAVA funds, including those distributed as grants under the HAVA College Poll Worker Program. Thus, EAC is requesting an additional FTE to assist with these management functions.

AIDING IN THE IMPROVEMENT OF VOTING SYSTEMS

One of the most enduring effects of HAVA will be the change in voting systems used throughout the country. All major HAVA funding programs can be used by states to replace outdated voting equipment. HAVA also provides for the development and maintenance of testable standards against which voting systems can be evaluated. It also provides for Federal certification according to these standards. EAC is responsible for and committed to improving voting systems through these vital programs.

Voluntary Voting System Guidelines

One of EAC's most important mandates is the testing, certification, decertification and recertification of voting system hardware and software. Fundamental to implementing this key function is the development of updated voting system guidelines, which prescribe the technical requirements for voting system performance and identify testing protocols to determine how well systems meet these requirements. EAC along with its Federal advisory committee, the Technical Guidelines Development Committee (TGDC), and the National Institute of Standards and Technology (NIST), work together to research and develop voluntary testing standards.



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On December 13, 2005, EAC adopted the first iteration of the Voluntary Voting System Standards (VVSG). This document was an initial update to the 2002 Voting System Standards focusing primarily on improving the standards for accessibility, usability and security. These testing guidelines also incorporated standards for reviewing voting systems equipped with voter verifiable paper audit trails (VVPAT) in recognition of the many states that now require this technology. VVSG also establishes the testing methods for assessing whether a voting system meets the guidelines.

Significant work remains to be done to fully develop a comprehensive set of guidelines and testing methods for assessing voting systems and to ensure that they keep pace with technological advances. In FY 2008, EAC along with TGDC and NIST, will revise and update sections of the VVSG and will continue work to develop a comprehensive set of test suites or methods that can be used by testing laboratories to review any piece of voting equipment on the market.

Accreditation of Voting System Testing Laboratories

HAVA Section 231 requires EAC and NIST to develop a national program for accrediting voting system testing laboratories. The National Voluntary Laboratory Accreditation Program (NVLAP) of NIST provides for the initial screening and evaluation of testing laboratories and will perform periodic re-evaluation to verify that the labs continue to meet the accreditation criteria. When NIST has determined that a lab is competent to test systems, the NIST director recommends to EAC that a lab be accredited. EAC then makes the determination to accredit the lab. EAC issues an accreditation certificate to approved labs, maintains a register of accredited labs and posts this information on its website.

In July 2005, NVLAP advertised for the first class of testing laboratories to be reviewed under the NVLAP program and accredited by EAC. Five laboratories have applied for the accreditation program. Pre-assessments of these laboratories began in April 2006. NVLAP anticipates that at least two of those laboratories will be reviewed and those that are eligible to be recommended for accreditation will be delivered to EAC in December 2006. The remaining three laboratories will be reviewed with an anticipated reporting date by NVLAP in spring 2007.

Because testing of voting systems could not be delayed, there had to be an interim review and accreditation of laboratories. In late 2005, EAC invited laboratories that were accredited through the National Association of State Election Directors (NASED) program as Independent Testing Authorities (ITAs) to apply for interim accreditation. All three ITAs have applied for interim accreditation. Interim accreditation reviews by EAC contractors began in the spring 2006. Two of the ITAs have been accredited on an interim basis, which is valid until the first class of laboratories is accredited through the NVLAP process.

Laboratories that are accredited by EAC through the NVLAP program will be reviewed on a regular basis to maintain their accreditations. In FY 2008, EAC anticipates that NVLAP will begin the first reviews of previously accredited labs. In addition, if additional laboratories apply for initial accreditation, NVLAP will process those requests and review those labs for accreditation.



U. S. ELECTION ASSISTANCE COMMISSION FISCAL YEAR 2008 BUDGET REQUEST

Voting System Certification

In 2006, EAC is assumed the responsibility of certifying voting systems according to national testing guidelines. Previously, NASED qualified voting systems to both the 1990 and 2002 Voting System Standards. EAC's certification process constitutes the Federal government's first efforts to standardize the voting system industry. EAC has implemented its pre-election certification program which focuses on reviewing changes or modifications that are necessary for the November 2006 elections. In October 2006, EAC published for public comment its post-election certification program. This program encompasses an expanded and detailed review of voting systems. It utilizes testing laboratories and EAC technical reviewers. The program also includes assessments of quality control, field monitoring, vendor registrations, and enhanced public access to certification information. EAC anticipates adopting this program as final in December 2006.

Historically, voting system qualification has been a labor intensive process. In six months, NASED received 38 separate voting system test reports for review and qualification. All requests must be received, processed and monitored while the testing laboratory is assessing compliance. Once a test report is produced, technical reviewers must analyze the reports prior to recommending systems for certification. These technical reviewers are experts in the fields of voting system design and function. Based upon the NASED data, this process will take anywhere from four to 120 hours per report. In addition, EAC's enhanced testing and certification program will require reviewers to evaluate voting system technical data packages prior to testing, which will take an additional four to 20 hours per voting system.

Current Financial and Human Resources Allocations

In FY 2006, EAC budgeted \$3.95 million to aid in improving voting systems used throughout the country. Of that amount, \$2.772 million was transferred to NIST for its research for and support of the TGDC. The remaining \$1.178 million was dedicated to the development, implementation, and operation of a voting system certification program and laboratory accreditation program. EAC currently employs one FTE to support all of these functions. In addition, EAC hired several experts to serve as technical reviewers.

In its FY 2007 request, EAC sought two additional FTE to support this program. One FTE will support the NIST and TGDC process of updating and upgrading the VVSG. The other FTE will assist with managing the certification process and assisting with monitoring the quality control of equipment produced by voting system manufacturers. Because experts and consultants are counted as FTE, EAC requires additional FTE to hire experts to serve as technical reviewers.¹

¹ EAC learned after the submission of its FY 2007 request that experts, consultants, and student interns counted as FTE. EAC raised this issue to the House and Senate Appropriations Subcommittees on Transportation, Treasury, Housing and Urban Development, the District of Columbia, and Independent Agencies. EAC requested four additional FTE for FY 2006 and 10 additional FTE for FY 2007 in order to account for the experts, consultants, and student interns. In response to the request from EAC, the subcommittees granted EAC four additional FTE in FY 2006 and reserved discussion of FY 2007 FTE to the pending FY 2007 appropriations bill. (See Appendix "1") In light of the fact that experts,



**U. S. ELECTION ASSISTANCE COMMISSION
FISCAL YEAR 2008 BUDGET REQUEST**

Financial and Human Resources Needs for FY 2008

In FY 2008, EAC requests \$5.2 million to support the activities of this program. Of that amount, \$3.25 million will go to NIST for work on the VVSG. The needed work includes updating and revising the testing standards and the development of testing protocols to assess whether a voting system meets the standards. A copy of the request and justification provided by NIST to EAC for FY 2008 is attached as Appendix "2". The remaining \$1.95 million will be applied to administering the voting system certification, voluntary voting system guidelines, and laboratory accreditation programs.

NATIONAL CLEARINGHOUSE OF ELECTION INFORMATION

HAVA establishes EAC as a national clearinghouse of election information, which means EAC studies and makes research available on a range of issues including best practices in election administration, hours and places for voting, and election data. EAC has conducted extensive research on a variety of topics related to election administration, has begun an ongoing process of collecting election related data, and has compiled election-related resources such as statutes and regulations. This information is presented to the election community and to the public through the EAC's website as well as through formal reports on studies and data collections. Through this clearinghouse, EAC positions itself as a primary source of information about Federal elections.

Research and Study

HAVA requires EAC to conduct a number of studies and provides considerable discretion to research other election administration issues to assist states in their efforts to make election administration improvements. EAC uses its Federal advisory committees to assist in prioritizing research topics that are important to and that will assist election officials. EAC has embarked on research projects that will produce guidance, best practices and reports on recruiting, training and retaining poll workers; redesigning ballots and information provided to voters; procedures for counting and recounting ballots; provisional voting; voter identification; voter fraud and intimidation; as well as launching a legal resources database that will provide election officials and the public with access to election laws and regulations from each of the 50 states. In addition, EAC has begun work on a comprehensive set of election management guidelines as a companion to the VVSG. In 2006, EAC produced four Quick Start Guides for election officials to use in implementing new voting systems, securing electronic voting, recruiting and training poll workers, and preparing ballots for elections.

In FY 2007, EAC will focus on completing the research required by HAVA on the use of social security numbers in voter registration, standards for electronic voting, the possibility of postage-free absentee voting, the impact of HAVA on first time voters who registered by mail, and the feasibility of alternative voting methods. EAC will also collect and analyze data from the 2006 Federal elections including voter turnout, absentee voting, voter registration and military and overseas citizen

consultants and student interns count against the FTE calculation, EAC is requesting the appropriate amount of funding and FTE to account for the needed experts, consultants and student interns.



U. S. ELECTION ASSISTANCE COMMISSION FISCAL YEAR 2008 BUDGET REQUEST

voting. The 2006 Election Day Survey will provide comprehensive data indicating the progress states have made in implementing HAVA. In addition, EAC will conduct research on how states can share information from their statewide voter registration databases and the use of voter hotlines to provide information to the public about elections and voting.

In FY 2008, EAC will need to prepare to collect data on the 2008 Presidential election, including making any needed revisions to its survey instrument. In addition, EAC will continue to work on research efforts listed in Section 241 of HAVA, including:

- Methods of voter registration and maintaining a secure and accurate list of registered voters;
- Methods of ensuring accessibility of voting, registration and polling places to all voters;
- Methods of educating voters about the process of registering to vote and voting;
- Federal and state laws governing the eligibility to vote;
- Methods of voter registration for members of the uniformed services and overseas voters;
- Broadcasting practices that may result in the broadcast of false information regarding polling place operation;
- Feasibility of providing voting materials in eight or more foreign languages; and
- Other matters the Commission deems appropriate.

EAC's Website as a Clearinghouse

Using EAC's website as its primary means of transmitting information to the public is a useful, accessible and cost effective tool. As studies, guidance and best practices are completed, EAC will have an increasing amount of information to store and display through its website. EAC will also use the website to provide information to the public about the voting system standards and certification program. Furthermore, EAC anticipates providing more interactive services through its clearinghouse function. EAC currently contracts for the hosting and maintenance of its website. To accommodate the expanding clearinghouse, EAC will need to expand its IT capabilities by either enhancing its contracts for web services and IT support or by considering bringing those services in house.

Current Financial and Human Resources Allocations

In FY 2006, EAC budgeted \$2.5 million for its research and study. EAC currently employs one full-time employee to direct and monitor EAC's research efforts.

Financial and Human Resources Needs for FY 2008

In FY 2008, EAC anticipates spending \$2.0 million on required research projects, data collection and analysis, development of best practices documents, and expansion and maintenance of its technical resources to host a clearinghouse on its website.



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GUIDANCE AND INFORMATION TO THE STATES

HAVA established EAC to provide guidance and assistance to the states on implementation of the law and transferred to EAC the responsibility of implementing the National Voter Registration Act (NVRA). EAC has provided valuable guidance to the states on what HAVA means, implementing the law, and appropriate use of HAVA funds. In FY 2007 and FY 2008, EAC will continue that work by developing election management guidance, expanding on its voter registration data base guidance, and by updating and revising the NVRA regulations and national voter registration form. The election management guidance is a comprehensive companion document to the VVSG that will assist states in managing an election from receipt of voting equipment to the reporting of results to the canvass or recount that follows. EAC's continued work on voter registration databases will focus on studying the appropriate use of security measures, verification of voter information using appropriate matching protocols, and sharing information with other state agencies and, ultimately, with other states. EAC will address issues involving voter registration using the Federal form by reviewing and revising the NVRA regulations and the Federal registration form.

Current Financial and Human Resources Allocations

EAC has budgeted \$750,000 in FY 2006 for these activities. EAC currently employs one full-time equivalent to serve the needs of this program.

Financial and Human Resources Needs for FY 2008

In FY 2008, EAC anticipates spending \$1.0 million on providing guidance and assistance to the states. EAC anticipates continuing the use of one full-time equivalent to support these activities.

ADMINISTRATION

The administration objective represents the efforts of EAC, internally or through contracts and MOUs, to support the mission and work of this agency and meet the HAVA-imposed mandates. These costs include rent, equipment, supplies, human resources functions, finance and budget, computers, telephones, publication, and printing. This objective includes maintaining the leadership and support staff for the agency. Charges for salaries and benefits for the Commissioners and non-programmatic support staff are included in this category. In addition, the administrative objective includes supporting the efforts of EAC's two Federal advisory committees, the Board of Advisors and Standards Board. Between these two boards there are 147 members who meet at least once in each fiscal year to fulfill their responsibilities under HAVA. The leadership of these Boards meets more frequently, approximately once each quarter.

EAC contracts with the General Services Administration (GSA) to provide human resources, financial and information technology services. These contracts have allowed EAC an economical way to provide these services. However, since EAC has become fully staffed and engages numerous experts and consultants, EAC needs to have an on-site human resources specialist to handle inquiries



**U. S. ELECTION ASSISTANCE COMMISSION
FISCAL YEAR 2008 BUDGET REQUEST**

regarding employment, benefits and leave. What is more, EAC feels that it is important to have an on-site contact for employees to make and have investigated employment related complaints.

Current Financial and Human Resources Allocations

In FY 2006, EAC budgeted \$4.4 million for administrative activities.

Financial and Human Resources Needs for FY 2008

In FY 2008, EAC anticipates spending \$4.6 million for administrative activities, which includes the salary and benefits for one additional FTE to serve as a human resources specialist.



**U. S. ELECTION ASSISTANCE COMMISSION
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EXPLANATION OF DISTRIBUTION BY OBJECT CLASS

11.1 Personnel Compensation - \$4,161,900.

Provides for 37 full-time equivalent (FTE) EAC staff salaries. The 37 FTE include 29 full-time permanent employees and eight experts, consultants, students and other part-time employees.

12.1 Personnel Benefits - \$1,056,874. Calculated at 30% of EAC full-time permanent staff salaries and 15.3% of experts, consultants and other part-time employee salaries. For full-time permanent employees this includes life insurance, health insurance, employee retirement, work injury disabilities or death and professional liability insurance.

21.0 Travel and transportation of persons - \$900,000. To reimburse the 110-member Standards Board and the 37-member Board of Advisors for travel and expenses related to conducting a 3-day meeting for each board twice each year; to reimburse speakers and participants at EAC public meetings and hearings; to reimburse EAC Commissioners and staff for travel expenses.

23.1 Rental Payments to GSA - \$470,000. Provides for payments to the Federal Buildings Fund for rent.

23.3 Communications, utilities, and miscellaneous charges - \$150,000. Provides for local and intercity telephone services; for postage and fees; and for other administrative expenses.

24.0 Printing and Reproduction - \$950,000.

Provides for the printing of State Plans, voluntary guidance, and Voluntary Voting Systems Guidelines in the Federal Register, and other printing of reports, studies, transcripts, etc.

25.0 Other services - \$2,313,000. Provides for contracts associated with HAVA-required administration and audit of requirements payments and other HAVA funds; program support for the laboratory accreditation and voting system certification programs; human resources, financial and IT support services by GSA; and web site management contracts.

25.5 Research and development contracts - \$4,750,000. Provides for transfer of \$3,250,000 to NIST for activities required under Sections 221, 231 and 245 of HAVA; to conduct research under Sections 241 and 244(b) of HAVA; and to maintain and supplement ongoing clearinghouse activities.

26.0 Supplies and materials - \$115,000. Provides for the purchase of administrative supplies and materials.

31.0 Equipment - \$600,000. Provides for the replacement of PC and LAN equipment to support the increased requirements of the clearinghouse data storage and to assure that aging equipment is repaired, replaced, and upgraded, as needed.



**U. S. ELECTION ASSISTANCE COMMISSION
FISCAL YEAR 2008 BUDGET REQUEST**

OBLIGATIONS BY OBJECT CLASS \$(Thousands)				
		FY 2006 Projected	FY 2007 Estimated	FY 2008 Requested
	Personal Compensation and Benefits			
11.1	Full-time permanent	2,333	2,451	3,308
11.3	Other than full-time permanent	0	0	854 ²
11.5	Other personnel compensation	0	279	0
11.9	Total personal compensation	2,333	2,786	4,162
12.1	Civilian personnel benefits	561	740	1,057
	Contractual Services and Supplies			
21.0	Travel and transportation of persons	566	900	900
23.1	Rental payments to GSA	1,118	450	470
23.3	Communications, utilities, and miscellaneous charges	112	130	150
24.0	Printing and reproduction	389	750	950
25.0	Other services	1,351	4,118	2,313
25.5	Research and development	6,599	6,500	4,750
26.0	Supplies and materials	43	105	115
	Acquisition of Assets			
31.0	Equipment	101	600	600
41.0	Grants, subsidies and contributions	300 ³	250 ⁴	0
99.9	Total Program	13,500	16,908	15,467

² This amount represents the cost of engaging experts and consultants. In FY 2007, this amount was reported in the "Other services" line.

³ Congress earmarked \$250,000 in the FY 2006 appropriation. EAC contributed an additional \$50,000. However, neither amount was included in EAC's FY 2006 request.

⁴ This amount has been earmarked in the House mark up of the FY 2007 appropriation. However, it did not appear in the FY 2007 request.



**U. S. ELECTION ASSISTANCE COMMISSION
FISCAL YEAR 2008 BUDGET REQUEST**

EXPLANATION OF CHANGES FOR FY 2008

- Funding to NIST reduced from \$4.95 million to \$3.25 million per the request provided to EAC (See Appendix "2")
- Increased funding for four additional FTE to support HAVA funds management, auditing, and administrative programs
- Transferred funding for experts and consultant from "25.0 Other Services" to "11.3 Other than Full-time Permanent"

EXPLANATION OF BUDGET CHANGES IN PRIORITY ORDER APPROPRIATION \$(Thousands)		
	FTE	\$
FY 2007 Request.....	33 ⁵	\$16,908
Changes:		
Reduction in funding to NIST per their request.....		(1700)
Increased funding for additional FTE, inflation, and program modifications.....		259
FY 2008 OMB Request.....	37 ⁶	\$15,467

⁵ EAC's FY 2007 request for 25 FTE did not include the number of FTE necessary to engage needed experts, consultants, and student interns. EAC learned after the submission of its FY 2007 request that experts, consultants, and student interns counted as FTE. Funding for these experts and consultants was shown in the "Other Services" budget class in the FY 2007 request. See Appendix "1" for information concerning the resolution of the insufficient FTE request for FY 2006 and FY 2007. EAC raised this issue to the House and Senate Appropriations Subcommittees on Transportation, Treasury, Housing and Urban Development, the District of Columbia, and Independent Agencies. EAC requested four additional FTE for FY 2006 and 10 additional FTE for FY 2007 to account for the experts, consultants, and student interns. In response to the request from EAC, the subcommittees granted EAC four additional FTE in FY 2006 and reserved discussion of FY 2007 FTE to the pending FY 2007 appropriations bill.

⁶ In light of the fact that experts, consultants and student interns count against the FTE calculation, EAC is requesting the appropriate amount of funding and FTE to account for the needed experts, consultants and student interns. The total FTE request represents the existing 25 FTE from the FY 2007 request, four FTE to serve in the HAVA funds management program and administration, and eight FTE to serve in the capacity of experts, consultants and student interns. A more detailed discussion of the functions that these persons will serve can be found in the program highlights section of this request.



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FISCAL YEAR 2008 BUDGET REQUEST**

Appendix 1



U.S. ELECTION ASSISTANCE COMMISSION
1225 New York Ave. NW - Suite 1100
Washington, DC 20005

June 30, 2006

Senator Christopher S. "Kit" Bond
 Chairman, Subcommittee on
 Transportation, Treasury, the
 Judiciary, Housing and Urban
 Development, and Related Agencies
 130 Dirksen Senate Office Building
 Washington, DC 20510

Via Facsimile and Email Transmission
202-224-4344
ATTENTION: Rachel Jones

Senator Patty Murray
 Ranking Member, Subcommittee on
 Transportation, Treasury, the
 Judiciary, Housing and Urban
 Development, and Related Agencies
 128 Dirksen Senate Office Building
 Washington, DC 20510

Via Facsimile and Email Transmission
202-228-0249
ATTENTION: Meaghan McCarthy

Congressman Joseph Knollenberg
 Chairman, Transportation, Treasury, and
 Housing and Urban Development,
 The Judiciary, District of Columbia
 Subcommittee of the House
 Appropriations Committee
 2358 Rayburn House Office Building
 Washington, DC 20515

Via Facsimile and Email Transmission
202-225-0900
ATTENTION: David Napoliello

Congressman John W. Olver
 Ranking Member, Transportation, Treasury,
 and Housing and Urban Development,
 The Judiciary, District of Columbia
 Subcommittee of the House
 Appropriations Committee
 1016 Longworth House Office Building
 Washington, DC 20515

Via Facsimile and Email Transmission
202-225-9476
ATTENTION: Kate Hallahan

RE: Full-time equivalents

Dear Senators and Congressmen,

The U.S. Election Assistance Commission (EAC) is writing to clarify and provide additional information regarding its need for full-time equivalents (FTE) in Fiscal Year 2006 and request for FTE in Fiscal Year 2007.

To fully explain the situation at hand, some background information is necessary. The Help America Vote Act of 2002 (HAVA) created EAC and authorized it to hire staff, obtain experts and consultants and contract for goods and services. (See 42 U.S.C. 15324(a) and (b), 15325(e); HAVA, Sections 204(a) and (b) and 205(e).) The EAC staff are the in the excepted service by virtue of the provisions of 42 U.S.C. 15324(a)(6), HAVA, Section 204(a)(6). Furthermore, EAC is authorized to obtain the assistance of experts and consultants through personal service contracts permitted under 5 U.S.C. 3109(b). Personal service contracts are different than service contracts solicited and let under the Federal Acquisition Regulation in that these contracts are made directly with individuals, not with a contracting firm, and persons hired as experts and consultants receive day to day instruction from the agency, often work side by side with government employees, and must qualify as an expert or consultant in their particular fields.

The EAC currently operates with an FTE cap of 23 persons, which includes the four commissioners. FTE is a calculation of the total number of man-hours that an agency can utilize in a single year. That cap was applied in both the FY 2005 and FY 2006 joint explanatory statements accompanying the corresponding appropriations bill. Those man-hours can be used to hire a full-time employee or several part-time employees. The usage of man-hours is further determined by the employee's start date and termination date. In addition to the 23 full-time staff members, EAC also employs several part-time student interns.

In planning both its FY 2006 and FY 2007 budgets, EAC allocated funding and FTE based upon the understanding that personal service contractors did not count against the FTE and that student interns were eligible for an educational employment program which would exclude them from the FTE count. It has recently come to our attention that this understanding was faulty and that personal services contracts pursuant to 5 U.S.C. 3109(b) and EAC's student interns are counted as a part of the FTE calculation. As a result, EAC anticipates that it will exceed the FTE cap set in the language of the joint explanatory statement of the FY 2006 appropriation by three to four FTE, and by ten FTE in FY 2007.

Explanation of Changes by Program

EAC anticipates using personal service contracts to hire six to ten part-time experts to work in its voting system certification program, the first such program operated by the federal government. These experts would review test reports provided by independent testing laboratories to determine that voting systems are properly tested and do, in fact, meet the minimum requirements to receive national certification. EAC also anticipates the use of one technical consultant to assist with writing and editing future versions of the Voluntary Voting System Guidelines (VVSG), including reviewing and considering public comments to the VVSG.

Currently, there are only three FTE that manage and audit the more than \$3 billion distributed under HAVA. While EAC has taken steps to obtain services from the Department of Interior and to contract for the performance of audits and assessments of state HAVA expenditures, there is no certainty that these services will be available in the coming fiscal year. Two additional FTE, in the form of contracted experts or consultants, are needed assure that we are able to maintain the human resources currently available through detail agreements. In addition to auditing HAVA funds, EAC must review and resolve audit findings, whether they are from state audits, single audits or agency audits.

The sheer volume of these reviews – covering the 50 states, four territories and the District of Columbia -- overwhelms the two FTE assigned to that task, and yet they also are responsible for answering front-end questions from states on how to use HAVA funds, managing the review of indirect cost proposals, and answering questions posed by EAC's Inspector General related to management's position on the appropriate uses of HAVA funds. These contractors would be used to bolster our audit program and to assist EAC employees with reviewing and resolving audit findings.

Furthermore, EAC believes that a part of its role in fostering best practices in election administration is to train and encourage young people to enter a career of public service as an election official. Students who work with EAC gain invaluable experience in the practices and procedures for conducting elections throughout this country. They also provide a valuable service in supporting EAC's program staff in their efforts to implement and operate programs such as voting system certification, laboratory accreditation, building a national clearinghouse of election information, disbursing and managing HAVA funds, and assisting states with the implementation of HAVA and the National Voter Registration Act.

To implement the programs that HAVA requires of EAC, we must have ten additional FTE in FY 2007. EAC has budgeted funds for these experts, consultants and interns as a part of both the FY 2006 and FY 2007 budgets. However, EAC did not anticipate that these classes of employees (student interns) and contractors would be counted in the FTE calculation.

The need for some of these FTE is immediate as the implementation of the certification program must occur by the end of July and technical reviewers will be needed as a part of that program. Quickly establishing a thorough, rigorous voting system certification program is crucial to address the needs of states and public concerns about the many new voting systems on the market today and assure that there is no break in the service of nationally certifying voting systems. Furthermore, work to be performed by the technical consultant on the VVSG, by staff in auditing and resolving the use of HAVA funds, and by student interns is ongoing.

If you have any questions or wish to discuss this matter further, please contact EAC Executive Director Tom Wilkey, or General Counsel Julie Hodgkins at 202-566-3100.

Sincerely,



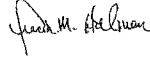
Paul DeGregorio, Chairman



Ray Martinez III, Vice Chairman



Donetta Davidson, Commissioner



Gracia Hillman, Commissioner

CLERK AND STAFF DIRECTOR:
FRANK M. CUCHING
TELEPHONE:
(617) 528-3771

The EAC was provided an FTE ceiling of 23 for fiscal year 2006, which includes the four commissioners. As we understand it, the EAC anticipates using personal service contracts to hire six to ten part-time experts to work in its voting system certification program to review test reports provided by independent testing laboratories to determine that voting systems are properly tested and meet the minimum requirements to receive national certification. Furthermore, we have also been advised that the EAC intends to employ student interns and train them in the practices and procedures for conducting elections, giving them invaluable experience as they assist EAC staff in a number of areas. The Committees on Appropriations

07/26/2006 14:59 FAX 202 226 0249

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strongly support the EAC's efforts to recruit and train young people from colleges, universities, and community colleges in the elections process.

Based on the information provided in your letter and conversations with EAC staff, it is our understanding that the EAC will not need any additional resources as a result of an increase to the FTE ceiling. Therefore, the House and Senate Committees on Appropriations approve the request to increase the FTE ceiling for the EAC to 27 for fiscal year 2006, provided that the additional 4 FTE are used only to hire part-time student interns and/or contract with individual expert consultants as outlined in your letter. Under no circumstances may these additional FTE be used to hire additional government employees. The Committees on Appropriations will continue to evaluate the staffing and resource needs of the EAC as the fiscal year 2007 appropriations process moves forward.

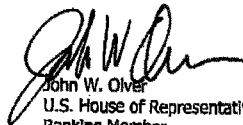
Sincerely,



Joe Knollenberg
U.S. House of Representatives
Chairman
Subcommittee on Transportation,
Treasury, Housing and Urban Development,
The Judiciary, District of Columbia
And Independent Agencies



Christopher S. Bond
U.S. Senate
Chairman
Subcommittee on Transportation,
Treasury, the Judiciary, Housing and
Urban Development, And Related
Agencies



John W. Olver
U.S. House of Representatives
Ranking Member
Subcommittee on Transportation,
Treasury, Housing and Urban Development,
The Judiciary, District of Columbia
And Independent Agencies



Patty Murray
U.S. Senate
Ranking Member
Subcommittee on Transportation,
Treasury, the Judiciary, Housing and
Urban Development, And Related
Agencies



**U. S. ELECTION ASSISTANCE COMMISSION
FISCAL YEAR 2008 BUDGET REQUEST**

Appendix 2

Proposed 2008 NIST Technical Program on Voting Systems:

Total Funding Request - \$3,250K

The major areas of NIST's 2008 program and funding levels are:

1. Standards Management – 2007 Voluntary Voting System Guidelines (VVSg 2007) (\$250K)

Revision of the VVSg as published by the EAC, was begun 4th quarter, FY05 and will culminate with the delivery to the EAC of a TGDC approved, completed draft VVSg in July 2007. The document will require public comment and resolution of the comments through FY 2008.

For this document, NIST will continue to conduct research and provide technical input and guidance to the EAC on document management issues, including updating of requirements.

Tasks include:

- *Research and analysis of voting systems technology and equipment*
NIST will conduct research and provide technical input and guidance to the EAC. The results of this research will form the basis for updating the VVSg.
- *Draft updates to the VVSg*
NIST will serve as primary author and editor of updates to the VVSg, working closely with the EAC. NIST will prepare initial and final presentations of updated material, present this material at meetings with the EAC, and revise materials accordingly.
- *Transparency*
NIST in association with the EAC, as appropriate, will conduct or participate in comment periods and interactions with vendors, researchers, and the public. Based on the results of these comment periods, NIST will revise or create new material, as appropriate.
- *Complete updated draft and deliver to EAC*
NIST will perform any final editing and produce the VVSg in final form, ready for delivery to the EAC.

2. Test Method and Test Suite Development and Maintenance (\$2,250K)

Test methods and test suites will be developed and maintained for three areas of the VVSg: Core Functionality, Cyber Security, and Human Factors. For each of these areas, NIST will determine applicable measurement techniques, testing approaches and testing protocols as well as develop test suites and testing tools to help ensure that VVSg requirements are met by voting systems.

Different techniques, approaches, protocols and test suites are needed to address the unique characteristics of each of these areas in order to ensure that all requirements in the VVSg are correctly implemented in voting systems. The development of public test

suites and tools for use by all accredited test laboratories will reduce the cost of testing, ensure consistency of testing among laboratories, and promote transparency of the testing process.

The testing funding is divided evenly among the following three areas.

Core Functionality

Core functionality addresses all general aspects and requirements of the VVSG that are not explicitly related to security or human factors. NIST will continue development of a set of conformance test suites for the core, functional capabilities of voting systems.

Tasks include:

- *Update taxonomy of test methods*
NIST will update its in-depth analysis and classification of test methods, including their applicability and cost effectiveness to voting systems to reflect changes to the VVSG and/or changes in requirements.
- *Conformance test suites*
NIST will continue in-depth analysis of each requirement, deriving objective means to measure and/or determine that the requirement is met. Based on this analysis, NIST will continue to apply the relevant test methods and continue development of test protocols and test suites. New test cases will be developed and previously developed test protocols and test suites will be reviewed, updated, and/or modified to reflect any changes in the VVSG requirements.
- *Testing tools*
To facilitate the development, usability, and reporting of test suites, NIST will develop and maintain, as necessary, test frameworks to automatically generate tests, setup (e.g., initialize) the testing environment, execute tests, and/or report test results.
- *Traceability matrix*
NIST will update the traceability matrix that shows the linkage from each test back to specific requirements in the VVSG.
- *Documentation*
NIST will produce documentation so that an independent test laboratory can reproduce the testing. The documentation will include the purpose and description of each test, level of expertise required to conduct the test and interpret the results, facilities and environmental conditions, instructions for initiating and executing the tests, and verdict criteria (i.e., how to evaluate the results).
- *VVSG Feedback*
In order to develop and maintain test suites, the tester must examine each requirement in the standard/guideline to develop test specifications and ultimately test cases. This scrutiny often results in the discovery of ambiguous, unclear or un-testable requirements. The development and maintenance of the test suite thus results in a feedback process to the standards developers, which often results in dramatic improvements to the standard/guideline. NIST will provide feedback regarding any errors, inconsistencies, ambiguities, etc. that are found in the VVSG as a result of NIST's thorough review of the detailed requirements of the VVSG.

Cyber Security

Cyber security addresses all aspects and requirements for the security of voting systems, including methods to protect and prevent fraud, integrity of voting information and votes, requirements to facilitate audits, and secure operation of the voting process and systems. NIST will continue development of security testing approaches and test suites to address issues such as the ability of voting systems to prevent tampering and detect fraud, and to allow for efficient audits. Various test methods will be applied to security testing to ensure cost effective testing commensurate with the risk to the voting process and/or system. NIST work in this effort will build upon and/or contribute to tasks and deliverables produced under the Core Functionality area.

Tasks include:

- *Test method analysis for security requirements*
NIST will update its in-depth analysis of each security requirement, determining the most effective test methods, including consideration of costs and risks. This work will augment the taxonomy of test methods produced under the Core Functionality area.
- *Conformance test suites:*
NIST will continue the development of test suites for security requirements that can be tested without access or knowledge of the internals of the voting system. New test cases will be developed and previously developed test suites will be reviewed, updated, and/or modified to reflect any changes in the VVSG requirements. NIST will produce necessary documentation and a traceability matrix.
- *Open-ended testing*
NIST will develop and implement a strategy and testing plan for conducting open-ended security testing that includes the identification of critical elements subject to open-ended testing, vulnerabilities to be analyzed, methods to determine the level and amount of testing needed, and the type of expertise required to perform the testing. NIST will develop and update a set of test protocols for open-ended testing.
- *Testing of commercial-of-the-shelf products (COTS)*
NIST will conduct research and implement a strategy for testing of COTS.
- *Documentation*
NIST will produce documentation so that an independent test laboratory can reproduce the testing. The documentation will include the purpose and description of each test, level of expertise required to conduct the test and interpret the results, facilities and environmental conditions, instructions for initiating and executing the tests, and verdict criteria (i.e., how to evaluate the results).
- *Feedback to VVSG*
NIST will provide feedback regarding any errors, inconsistencies, ambiguities, etc. that are found in the VVSG as a result of NIST's thorough review of security requirements in the VVSG.
- *Methods to detect fraud*
NIST will continue to update and maintain its National Software Reference Library (NSRL) for voting systems. The NSRL will help enable state and local election officials to discover if certified voting systems have been modified prior to delivery.

NIST will continue to work with state and local election officials in obtaining data for the NSRL and developing procedures for election officials on its use and deployment.

Human Factors

Human factors address all aspects and requirements of accessibility and usability of voting systems. Testing for accessibility or usability of a voting system must take into account the 'human' during all aspects of the voting process and in using the voting system. NIST will create and update performance benchmarks for a range of voter interactions with a voting system and continue to develop tests to determine compliance with the benchmarks. NIST work in this effort will build upon and/or contribute to tasks and deliverables produced under the Core Functionality area.

Tasks include:

- *Conformance tests for performance requirements*
NIST will continue in-depth analysis of each requirement, deriving objective means to measure and/or determine that the requirement is met. Based on this analysis, NIST will continue to apply the relevant test methods and continue development of conformance test suites and performance metrics as necessary. Previously developed test suites and metrics will be reviewed, updated, and/or modified to reflect any changes in the VVSG requirements.
- *Test protocols*
NIST will update and maintain the protocols and procedures for conducting accessibility and usability testing programs, including the selection of test participants, directions on setting up, executing, and monitoring the testing, and interpreting results.
- *Validation and refinement of test suites*
NIST will continue to conduct a series of pilot programs to test the test suites.
- *Test protocol and benchmarks documentation*
NIST will produce documentation for the test protocols and benchmarks so that an independent test laboratory can reproduce the testing. The documentation will include the purpose and description of each test, level of expertise required to conduct the test, ability of the person executing the test, facilities and environmental conditions, instructions for initiating and executing the tests, and verdict criteria (i.e., how to evaluate the results).
- *Feedback to VVSG*
NIST will provide feedback regarding any errors, inconsistencies, ambiguities, etc. that are found in the VVSG as a result of NIST's thorough review of human factors requirements in the VVSG.

3. Research in Voting Systems Technology (\$250K)

The TGDC determined a need for a research program to address emerging technology and methods to further improve the voting process and voting systems. NIST will conduct research and produce assessment papers to advance the state-of-the-art of voting systems and to improve the voting process through the use of information technology. These assessment papers will provide the groundwork for future voting systems and the evolution of the voting process.

Tasks include:

- *Research and assessment papers*
NIST will conduct research and write assessment papers on relevant issues, such as support for Election Day verification of voters, formatting of registration information (possibly using Extensible Markup Language-XML) to make it easier for states to share information, voter registration processing, support for absentee voting and multi-day voting, election official and poll worker usability, document requirements, and remote voting.
- *Workshops and meetings*
NIST will conduct and participate in workshops and meetings to solicit and gather input to research topics.

4. Technical Support to EAC - Voting System Certification Process (\$250K)

As required by Section 231 of the Help America Vote Act, the EAC is required to provide for the testing, certification, decertification, and recertification of voting systems. To accomplish this goal, the Commission developed a program for accrediting independent, non-Federal testing laboratories in conjunction with NIST's National Voluntary Laboratory Accreditation Program (NVLAP). These accredited laboratories test voting systems in accordance with applicable EAC standards. To assist the EAC in operating and maintaining its certification process, NIST will provide technical support, as appropriate.

Tasks include:

- *Technical Guidance*
NIST will provide technical guidance to the EAC as requested for interpretations of the VVSG standards as well as review of technical data packages, test plans, and test reports forwarded by EAC accredited voting system testing laboratories.

5. NVLAP On Going Accreditation of Laboratories (\$250K)

In accordance with HAVA, the National Voluntary Laboratory Accreditation Program (NVLAP) for Voting Systems Testing will continue to assess non-Federal laboratories for testing voting systems that meet international testing and calibration standards (ISO 17025, "General Requirements for the Competence of Testing and Calibration Laboratories"). In addition, NVLAP will coordinate with the EAC to monitor and review on an ongoing basis, the performance of voting system testing laboratories (VSTLs)

Tasks include:

- *Assessment of Non-Federal Testing Laboratories*
NVLAP will continue to conduct assessments of laboratories that apply for accreditation to test voting systems. Once NVLAP assessment is successfully completed, the Director of NIST will forward to the EAC recommendations for laboratories to be accredited to test voting systems as appropriate.
- *Program for recertification and decertification of VSTLs*
NVLAP will coordinate with the EAC to develop a program for the recertification and decertification of voting system testing laboratories (VSTLs). NVLAP will implement the program in FY 2008.

Response to Questions Regarding the EAC Oversight Hearing on August 2, 2007

Robert S. Montjoy
Professor of Political Science
University of New Orleans

1. The EAC spent half a million dollars of public funds to commission these studies. In your testimony you discussed the need for EAC to exercise quality control on EAC research. If questions exist about the accuracy of a consultant's data and conclusions, should the Commission or peer review group discuss these issues with the research consultants? Was it appropriate for EAC to alter the reports and conclusions of its consultants without discussing and deliberating the changes at a public meeting?

Let me address the fraud and intimidation study, which is the one I focused on. The key issue, in my opinion, is the purpose of the study. It was clearly intended as part of a research design. The consultants were asked to define the terms, collect and synthesize existing knowledge, and suggest methods for future research. A research design is the first step in the research process. This report is really only part of the research process. The next step would be to choose one or more methods to conduct the research. The third step would be to conduct the research, and the fourth step would be to analyze the data and reach conclusions. The information that the consultants gathered was appropriate for the first stage in this process. The problem comes in using that information to reach the kinds of conclusions that should come in the fourth stage.

In the hearing I was asked whether twenty-four responses were sufficient to support a conclusion about the existence of fraud in polling places. The answer is obviously "no" if the goal is to generalize with any confidence about the distribution of opinion on this subject. But I do not think that was the goal. Instead, it was to gather information on the kinds of behaviors that would constitute fraud and intimidation and to find or invent methods for determining the extent of these behaviors. The interviews contain ideas that could be very useful in guiding subsequent stages of this project. They are not appropriate for reaching final conclusions about the problem.

I make this point because of questions raised about the EAC's role in monitoring the project. If the research had observable flaws, the EAC should have noticed them and taken remedial action. On the other hand, conclusions that go beyond the intent of and expectations for a project may not be noticed until the report is submitted. Those were the sorts of conclusions that the EAC was unwilling to publish under its name.

The issue is unusual because one would not normally publish a research design in the first place. Who would be interested? In this case, however, we are dealing with a sensitive subject, one on which there are strong opinions. The *New York Times* article that I mentioned in my testimony illustrates the impact that statements can have.

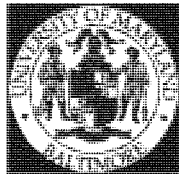
You asked whether the EAC should have discussed their concerns with the consultants. My understanding was that they did.

Your second question was whether it was appropriate for the EAC to alter the reports without discussing and deliberating the changes at a public meeting. Again, I thought that the report was adopted in a meeting of the advisory board that was open to the public. The broader question is whether the contract was intended to produce a report under the consultants' names. If the consultants were listed as the authors, then it would have been inappropriate to make any changes without their approval. I am not an attorney and do not have any special expertise in intellectual property rights, but my reading of the contract is that it was a work for hire, in which case the EAC could use the information in the consultants' report to produce its own report. I have conducted research and produced reports under such terms. One lesson that can be learned from this experience is to make sure that all parties fully understand the plans for the use of research products.

I am not sure that a public meeting would do much to advance the research process. The issues involved are often technical and, in any case, require review in depth rather than short statements. However, allegations about political influence must be taken seriously. The new EAC policy of releasing all materials related to its research projects should help to alleviate concerns. Although this policy could have an unfortunate side effect of producing misunderstandings through the airing of premature conclusions, the advantage of transparency is probably worth the cost. But the EAC should retain responsibility for reports it issues under its name. A two-stage peer review process for all research would help in this regard and make decisions even more transparent. One review would be of the research design before a contract is awarded and the other would be when a draft final report is submitted.

2. In your opinion, what priorities or what actions should the EAC focus on in the upcoming months to prepare for the 2008 election.

First, as I suggested above, the EAC should review and formalize its procedures for reviewing research contracts. Then, I think it is very important that the EAC continue research on voter fraud and intimidation. These are very difficult subjects to research, but they are too important to ignore. It would not be possible to complete a new project before the 2008 election, but it might be possible to design one to be executed during or after the election.



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RESPONSES TO QUESTIONS FOR THE RECORD
from the HOUSE ADMINISTRATION COMMITTEE
September 14, 2007

1. Process for Addressing to Reports Subject to Criticism. First and foremost, section 207(2) of HAVA requires the EAC, without exception, to release reports submitted to it. No matter how firmly the Commission may believe a report is flawed, Congress has prohibited it from either withholding or editing that report. The Commission has no authority to overrule Congress. In point of fact, however, this is good policy: a truly deficient report will fall of its own weight, but in areas of genuine controversy, a free exchange of ideas, including both those of the report's authors and those of its critics, on or off the Commission, is the best way to reach a consensus about difficult and controversial issues.

Second, the Commission may not act in this or any other manner except through an open meeting with at least three affirmative votes for whatever course of action it selects. Section 208 of HAVA allows EAC's authority to be exercised only by the vote of at least three commissioners. The Sunshine Act, 5 U.S.C. § 552b(b), which declares that "[m]embers shall not conduct or dispose of agency business other than in accordance with this section," which requires public notice and an opportunity to attend any meetings of the commission. Here again, even if some or all commissioners believe informal approaches are superior to public meetings and votes, they have no authority to overrule Congress. And again, even if the Commission was not subject to these legal constraints, the required practices also are important for maintaining the public trust and confidence necessary for EAC to perform its important work.

Finally, discussing any perceived problems in received reports with the authors is standard practice among agencies with serious research agendas. Sometimes such inquiries can allow correction of inadvertent errors. On other occasions, they can enable the researchers to provide additional information that resolves any confusion. On still other occasions, the dispute may remain. The inquiry may nonetheless help sharpen the dispute meaningfully to allow further scholarly debate to proceed in a more focused and informed manner. In any complex research project, the authors are, by definition, the leading experts on the data analyzed, the models posited, and the methodology selected. Failing to make maximum advantage of that expertise,

even when their work has gone badly astray, is wasteful and is likely to exacerbate any uncertainty resulting from the report in question.

2. One- and Two-Tailed Probability Measures. All statistical modeling depends on the judgment and integrity of the researcher. The determination of whether to apply a one- or two-tailed test of statistical significance is no exception. The one-tailed test is not a gimmick researchers use “to double their chances of finding statistically significant results.” It is the correct measure of the strength of the evidence of the importance of a variable when that variable’s likely effect, if any, is in a known direction. The two-tailed test, by contrast, is appropriate when a variable plausibly may have either a positive or a negative impact. Thus, when measuring the impact of increased cheese consumption on human health, most researchers likely would use a two-tailed test, accounting for the possibility that the increase in protein consumption could have a positive effect or that the increase in fat intake could have a negative one. On the other hand, when measuring the impact of increased police patrols on crime rates, only a one-tailed test would be appropriate because we have no plausible reason to believe that having more officers on the beat could increase crime: its effect on crime is either negative or null.

The researchers for the voter identification study determined that requiring voter identification could either reduce voter participation or have no effect. Consistent with that determination, they therefore applied a single-tailed test of statistical probability. The Heritage Foundation proposes an inventive theory that voter identification laws will increase stay-at-home voters’ confidence in the electoral process and draw them to the polls. Thus, according to the Heritage Foundation, voter identification laws’ impact on voter turn-out could be either positive or negative (or null) and a two-tailed test for statistical significance is appropriate.

Which of these two approaches is appropriate depends on one’s views of the plausibility of the hypothesis that voter identification laws might increase voter turn-out. The Heritage Foundation offers no meaningful data to support its behavioral theory. Knowing that the public approves of voter identification laws tells us little about whether meaningful numbers of eligible voters who do not vote at present will be aware of these laws and be sufficiently impressed by them to change their behavior. Even if one found the Heritage Foundation’s sparse, anecdotal evidence of voter fraud persuasive, it has little to do with this point. A voter’s chances of influencing the outcome of a particular race is no more affected by fraud than it is by any other factor – a charismatic candidate, an effective get-out-the-vote organization, favorable media coverage, a catchy slogan – that might affect other voters in that race. My chances of influencing the outcome in a race depend on there being equal numbers of other votes for and against my preferred candidate, however those votes go there. Thus, even if the Heritage Foundation is correct in its speculations that fraudulent voting is common and that changes in the likelihood of deciding an election drive voter behavior, it would not follow that voter identification laws would increase turn-out.

A responsible researcher disregards wildly implausible, unsupported hypotheses in constructing a model. Someone might speculate that criminals like a challenge, but that would hardly justify a criminologist in testing whether a greater police presence might raise the crime rate in the area being patrolled. That study properly should be conducted with a one-tailed test of statistical significance. Absent any more plausible reason to suspect that voter identification laws increase

voter turn-out than the Heritage Foundation supplies, the voter identification study was properly conducted with a one-tailed test as well.

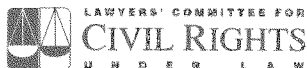
3. Priorities in Advance of the 2008 Election. I would defer to those with greater expertise in election management for a more nuanced sense of what EAC's priorities should be leading up to the elections. I offer only a few general observations.

First, major research takes time. So does implementing major changes in election operations. It likely is too late for any *major* studies EAC might commission now to produce results that could affect the conduct of the 2008 election.

Second, some research may depend on intensive, simultaneous observations to be effective. EAC should seek to identify any important questions whose answers could aid election administrators in subsequent elections that require this sort of research. Assembling a research team, drawing an appropriate sample of sites, obtaining necessary permissions, hiring and training field observers, and testing study instruments also take time. Any studies seeking to take advantage of the live conditions of the 2008 election therefore need to be commissioned without delay.

Third, most state legislatures will pass the budgets that fund the 2008 election in the first few months of next year. Many governors are already hard at work on their budget submissions. For any best practices standards to affect spending on that election, they must be promulgated in the next few months. For example, media reports in the last few elections have suggested multi-hour waits to vote primarily have afflicted low-income urban areas. A clear standard about the minimum number of voting machines per thousand voters, and the maximum site-to-site variation in that number consistent with equal access, could prompt purchases of additional equipment if publicized over the next few months.

Finally, although major studies likely take too much time to be completed before the election, some data already available, or readily compiled, about states' resources and practices, could nonetheless help inform the funding and policies for the upcoming elections. Thus, for example, a fifty-state listing of the average number of voting machines per voter, the intra-state variance in those numbers, or the median distance to polling places in urban and rural areas, might spur modest but important policy changes.



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October 17, 2007

Hon. Zoe Lofgren
Chair, Subcommittee on Elections
Committee on House Administration
United States House of Representatives
1309 Longworth House Office Building
Washington, DC 20515-6157

Dear Chair Lofgren:

Below I have set forth my answers to the written questions you sent me regarding the Election Assistance Commission hearing of August 2, 2007 at which I testified. I apologize for my delay in responding.

1. You served on the working group for the EAC's study on voter fraud and voter intimidation. How did the final version of the Voter Fraud and Intimidation Study differ from your understanding of the results of the research performed by the consultants and the discussions of the Working Group?

There were fundamental differences between the final EAC report and my understanding of the results of the research performed by the consultants as it was related to me and the other members of the Working Group. These differences were discussed at length in my testimony of August 2 and I refer you to that testimony. In addition, it is noteworthy that the final EAC report is entitled *Election Crimes: an Initial Review and Recommendations for Future Study*, whereas the study that the HAVA mandates and that the research the consultants performed was on voter fraud and intimidation. This difference is substantive – by limiting the scope of the study to “election crimes”, intimidating actions that are not criminal were eliminated from the scope of the review. The Working Group discussed this issue at length and it was agreed that limiting the scope of the review to election crimes may make sense for voter fraud but would be overly restrictive for voter intimidation. The draft report did not restrict voter intimidation to criminal acts and stated that voter intimidation remains a significant problem. The final report changed the definition of voter intimidation to limit it to criminal acts and stated that “intimidation is also a topic of some debate because there is little agreement concerning what constitutes actionable voter intimidation.”

2. **The EAC spent half a million dollars of public funds to commission these studies. In his testimony, Professor Montjoy discussed the need for EAC to exercise quality control on EAC research. If questions exist about the accuracy of a consultant's data and conclusions, should the Commission or peer review group discuss these issues with the research consultants? Is it appropriate for the EAC to alter the reports and conclusions of its consultants without discussing and deliberating the changes at a public hearing as the Commission did with the Voter Fraud and Intimidation Study?**

Objections to research commissioned by the EAC should be discussed with the consultants who conduct that research. The consultants should be given the opportunity to consider whether the report should be modified to the extent the objections are valid. In the case of the *Voter Fraud and Intimidation/Election Crimes* report, the final report that was released was so different from the draft report and its findings that many, including those of us who were involved with the research process, doubted that its consideration within the Commission was the result of an apolitical process. In addition to working with the consultants to understand their conclusions and refine the research to address the charge laid out by the EAC, the process must be more transparent. As a member of the working group we were not kept abreast of the progress of the report, nor were we consulted on the report's changes and the reasons for them. Members of the Advisory Committee were likewise kept in the dark.

If this report needed to be altered, that process should have brought in all of the relevant players: the consultants, the Working Group, and the EAC Board of Advisors. The public should also have been made aware of any alterations. The EAC should not be permitted to alter the reports and conclusions of the consultants it engages without a deliberative process that seeks input from others. Otherwise, as is the case with the Voter Fraud and Intimidation Report, there will be little trust in the neutrality of the products that come out of the EAC. This does not just lead to questions about the Commission's reporting, but all of its deliberations. The EAC should be more transparent across the board.

3. **Voting rights advocates worked closely with Congress to pass the Help America Vote Act (HAVA) and continue to advise the EAC as members on the Advisory Board. Please provide a summary of areas in which you believe that the EAC can improve its implementation of HAVA.**

The Lawyers' Committee was part of the advocacy coalition that who worked on the legislation that became HAVA. Our Executive Director, Barbara Arnwine, serves on the EAC's Advisory Committee. While we are encouraged by some of the work of the EAC, we are also concerned that some of the core functions of the EAC are being lost.

There is certainly room for improvement on the Commission. Generally, there must be a renewed commitment to the Commission's core constituency – American voters. While the EAC plays an important role in working with and responding to election officials, all of its actions should be in furtherance of the fundamental principle that every eligible voter should have the opportunity to cast a meaningful ballot. Unfortunately, I think, to some extent, that commitment has been lost.

In order for the EAC to accomplish its core mission, it needs to implement significant administrative reform. Too much of the Commission's deliberations are haphazard. It is difficult for even an organization as involved with the EAC as the Lawyers' Committee to determine how decisions were made, by whom, and on what grounds. Except for the most routine decisions necessary to administer the agency, decisions should be made publicly with adequate time for voters and advocates to comment. It should be clear (which it is not right now) the process for making decisions. At the August 2 hearing, the Commissioners who testified stated that they would implement a transparent process for making decisions. It does not appear that such a process has been implemented.

The research of the Commission should also be conducted through a more structured process. There should be transparency about what research is being conducted, who is conducting the research and what the outcome of the research is. In the case of the EAC's *Election Crimes* report, for example, the conclusions released by the Commission differed wildly from the conclusions reached by the consultants who produced the underlying research, yet there was no adequate explanation why those results were kept from voters and advocates. Moreover, that process was kept secret from the Board of Advisors, despite repeated attempts to assess the process, the original research and the reasons why the report's release was first inexplicably delayed and then dramatically altered. The Board of Advisors should have the opportunity to be intimately involved with research projects.

The EAC must remain a non-partisan body with only apolitical concerns about elections, election administration and voting. This is how it must conduct its work. Recent experiences with the commission suggest that partisan motivations have animated some of its decision making. This violates HAVA and it violates the trust that American voters have in such an agency to be impartial; concerned not with who they vote for, but that they vote.

4. In your opinion, what priorities or what actions should the EAC focus on in the upcoming months to prepare for the 2008 election?

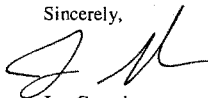
Over the next year the EAC has an opportunity to make elections more responsive to voters by working with election officials to ensure proper planning and implementation of election administration. The EAC should work with election officials to devise a model strategic planning process that will help local officials to be as prepared as

possible for the election. The EAC should lay out benchmarks and goals that will help local officials run a smooth election and identify problems enough in advance of the elections to solve them. The plan should include a structure to help local officials determine resource levels that will lead to a smooth election (including suggesting rubrics for determining how many poll workers are needed, what other staffing is needed, how many machines, ballots and other supplies are needed at each polling place). The plan should also suggest best practices for election practices such as processing registration forms and administering the absentee balloting process. Finally, the EAC should propose effective structures to deal with Election Day problems.

While the EAC has produced these types of materials in the past, the emphasis needs to be changed so that the recommendations and planning process focuses on what is going to allow the maximum number of eligible voters cast a ballot. This, the EAC's mandate, means that the EAC should recommend registration procedures that do not disqualify voters because of a technicality. It means that the process appreciates the different realities of voting based on geography, demographic information, and other factors. The EAC must approach this process openly. Voting rights advocates and experts need to be involved with the process and should be able to review any planning that the EAC conducts. The EAC Board of Advisors should be involved and kept abreast of any developments with the planning process.

Thank you for providing me with the opportunity to testify before the Committee and address these important issues. Please let me know if I can be of further assistance in providing information to the Committee concerning the Election Assistance Commission or any other matter in the Committee's jurisdiction.

Sincerely,



Jon Greenbaum
Director, Voting Rights Project

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